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THESIS/~~DISSERTATION~~

Government Misrepresentation and Nondisclosure of
Acquisition-Related Information In Federal Procurements

Kenneth John Belongia, Major

AFIT Student Attending: George Washington University

AFIT/CI/CIA- 92-087

AFIT/CI
Wright-Patterson AFB OH 45433-6583

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Government Misrepresentation and Nondisclosure of Acquisition-Related Information in Federal Procurements

By

Kenneth John Belongia

B.A. May 1977, George Mason University
J.D. May 1985, Arizona State University

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Thesis directed by
John Cibinic, Jr.
Professor of Law

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Government Misrepresentation and Nondisclosure of Acquisition-Related Information in Federal Procurements¹

*The need for mutual fair dealing is no less required in contracts to which the government is a party, than in any other commercial arrangement. "It is no less good morals and good law that the government should turn square corners in dealing with [contractors] than that [contractors] should turn square corners in dealing with their government."*²

I. Introduction

The Government's duty to disclose information spans the entire scope of federal procurements. At the heart of the matter is -- to use a word that has been greatly used of late -- integrity. In fact, that word has developed into a term of art that causes both Government and contractor attorneys to cringe. The last few years in the world of federal contracting has seen more integrity legislation than ever before. Call it what you want -- decency, honesty, integrity -- it all strikes the very same chord -- fair play. It is what both contractors and the Government strive for, but often never achieve; that is, if you believe Congress or the media,

¹The author is currently on active duty with the United States Air Force. The views expressed herein are solely those of the author and do not purport to reflect the position of the Department of the Air Force, the Department of Defense, or any other agency of the United States Government.

²*Maxima Corp. v. United States*, 847 F.2d 1549, 1556 (Fed.Cir. 1988) quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 S.Ct. 289, 301, 7 L.Ed.2d 240 (1961) (Black, J., dissenting), with parenthetical modification.

who both tend to dwell on selected aberrant procurement problems while ignoring the fact that the behemoth system of federal procurement works and works well.

The recent history of federal procurement sets the stage for where we are today regarding the disclosure of information to contractors. Not long ago, two prominent Government contracts experts set forth their thoughts on the serious increase in litigation concerning federal contracts and offered their view to the future.³ They traced the advent of modern Government contracts to the post-World War II era ("in which the contractor sought to recover its costs and to make a profit, and the government sought to obtain quality goods and services"⁴) through the 1950s and 1960s where, under the direction of select procurement powerhouses like the Navy's Admiral Rickover, the Government's interest, although still concerned with quality, shifted to include attempts to control costs and put pressure on contractors with legislation like the Truth in Negotiations Act.⁵ Next came Government authorization to conduct compliance audits of contractors' records, followed closely by a small army of green eye shade-bearing Government auditors, and eventually, criminal

³Crowell and Monroe, *The Adversarial Process and the Growth of Litigation* (1987).

⁴*Id.* at 2.

⁵*Id.*

investigators a la Operations Uncover and Ill Wind.⁶ The authors made a very astute observation -- an observation which underlies the entire theme of this thesis -- concerning trust. After all, how can you have a level playing field without trust? And without a level playing field who will want to compete for federal contracts? They state:

Along with increased scrutiny came increased distrust. Rather than operating in an environment of mutual trust and cooperation, increasingly the government and its contractors have begun to act as completely separate entities bound together only by contract. That is, the nature of the relationship between the government and its contractors was changing -- it was, and still is becoming, more and more adversarial.⁷

No hope is offered for the future. They contend that the "parade of new laws, regulations, and policies" have significantly shifted the risks of doing business with the Government and that the future holds more litigation, regardless of the size of the defense budget.⁸

The Reagan administration will go down in history for its philosophy of "peace through strength" and the most expensive peace-time defense buildup ever. Unfortunately, along with this renewed emphasis on defense spending came two famous

⁶*Id.*

⁷*Id.*

⁸*Id.*

investigations that have set the tone for federal procurements for the foreseeable future: Operations Uncover and Ill Wind.⁹

Operation Uncover was the first of the two investigations and ended in 1990 after six years with the conviction of six corporate defendants and six individual contractors.¹⁰ The charges centered around the disclosure to the defendants of classified planning, programming, budgeting system (PPBS) data.¹¹ In their defense, the defendants argued primarily that, at the time, the documents were generally available to the industry and that they were unfairly targeted for prosecution.¹²

⁹See Cutting, *Crime and Regulation: The Saga of Operations Ill Wind and Uncover and Their Regulatory Progeny*, A.B.A. Sec. Pub. Cont. L., *Access to Information: Yours Mine & Ours*, (Feb. 8, 1991) at Tab C.

¹⁰*Id.* at 2-8. The corporate defendants included GTE Corporation, The Boeing Company, RCA Corporation, Hughes Aircraft Company, Grumman Corporation, and Raytheon Company. The individual defendants were all corporate employees.

¹¹*Id.* at 2-8. Specifically, the defendants were charged with violations of 18 U.S.C. § 371 (conspiracy to commit offense or defraud United States); § 641 (embezzlement and theft -- public money, property or records); § 642 (embezzlement and theft -- tools and materials for counterfeiting purposes); § 793(e) (espionage and censorship -- gathering, transmitting, or losing defense information); and § 1341 (mail fraud -- frauds and swindles).

¹²For an excellent analysis of theories used to criminally prosecute persons who have obtained information in violation of disclosure statutes and regulations, see Gorelick and Enzinna, *Restrictions on the Release of Government Information*, Conference Book of The First Annual Institute on Federal Procurement Fraud, the District of Columbia Bar and The George Washington University, Jan. 18-29, 1991, Washington, D.C.

As compared to Operation Ill Wind, Operation Uncover was small scale. Ill Wind piggybacked on the illegal activities identified by Uncover in investigating inside information that had been leaked from Pentagon insiders to defense contractors, but the investigation was more intense and the prosecutions more abundant.¹³ To date there have been between 45 and 46 convictions and prosecutors are expecting 100 convictions before all is said and done in the years to come.¹⁴ Just recently, the Ill Wind task force obtained a guilty plea from the highest ranking target of the investigation, Assistant Secretary of the Navy, Melvyn R. Paisley.¹⁵

¹³As of the end of calendar year 1990, Ill Wind had resulted in 38 convictions including nine defense industry consultants, two Marine Corps employees, three Navy employees, four corporations (Teledyne, Hazeltine, Whitaker Command and Control Systems, and Loral), and 20 corporate employees. *Id.* at 18. Individuals have been sentenced to terms of up to 32 months and the fines assessed total nearly \$500,000. The Washington Post, May 27, 1991, at B1, col. 3.

¹⁴Telephone interview with United States Air Force Lieutenant Colonel Vernon J. King, assigned to the Office of the United States' Attorney for the Eastern District of Virginia, (15 May 1991). Lt Col King indicated that the convictions have centered on 18 U.S.C. § 201 (bribery of public officials and witnesses); § 287 (false, fictitious or fraudulent claims); § 371 (*supra* note 11); § 641 (*supra* note 11); § 1001 (false statements); and § 1343 (fraud by wire, radio or television). Charges may yet be brought against one or more defendants for violating 18 U.S.C. § 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises).

¹⁵The Washington Post, June 15, 1991, at A1, col. 6. Mr Paisley pleaded guilty to conspiracy, bribery, and conversion of Government property and could receive a sentence of 30 years and a fine of \$750,000. More convictions may be forthcoming as he has agreed to provide investigators more information on illegal disclosure by the Pentagon's senior leadership. *Id.*

The number of laws with both criminal and civil sanctions that can have detrimental effects on contractors tilt the field more than just a little. Compare, for example, contractor fraud to Government misrepresentation. These offenses should be different sides of the same coin, yet the sanctions are nowhere near the same. If a contractor commits fraud, he risks a substantial fine, jail time, suspension and debarment. If the Government misrepresents, the sanctions are not so severe -- the contract may be voided or subject to rescission or reformation and the individual who actually misrepresented could face a loss in job security or more.¹⁶

As will be seen, there is no question that the Government has a duty to disclose information in certain instances and to not misrepresent facts material to a procurement. It is a mistake; however, to think that most of the problems occurring in this area are systemic in nature. The reality is that on both sides -- the Government and contractors alike -- there are employees who cross over the bounds of duty, abuse their discretion and must be held accountable. Those situations cannot and will not ever be remedied by legislation and regulation. What can and should be addressed by Congress and the Executive Branch is the amount of training Government

¹⁶See 18 U.S.C. § 1905 (disclosure of confidential information generally) where the sanctions include a fine of not more than \$1,000, one year in jail, and removal from office or employment.

procurement personnel receive and the consistency of policies regarding disclosure of information. This consistency will do much to clarify the disclosure rules not only for the Government officials who release information, but also for contractors who receive it.

Mostly out of a desire for self-preservation, much has been written about what contractors must disclose and to who and when.¹⁷ When you combine laws like the False Claims Act¹⁸, the False Statements Act¹⁹ and the Truth in Negotiations Act²⁰ (to name just a few) with the Government's ability to terminate for default, terminate for convenience, suspend, and debar (to name just a few), it is easy to see why contractors perceive a definite tilt in the playing field, which triggers reactions by industry, which lobbies Congress, which tends to enact more corrective legislation. And so it goes. The media also deserve some of the blame. They are quick to

¹⁷See, e.g., The District of Columbia Bar and the George Washington University National Law Center, *The First Annual Institute on Federal Procurement Fraud*, supra note 12 where the major topics of discussion were: (1) priorities and new directions in criminal enforcement; (2) acquisition of information by contractors; (3) the False Claims Act; (4) qui tam actions; (5) organizing the defense of a criminal investigation; (6) self-policing and voluntary nondisclosure; (7) the corporate sentencing guidelines; and (8) suspension and debarment.

¹⁸31 U.S.C. § 3729 (civil fraud) and 18 U.S.C. § 287 (criminal fraud).

¹⁹18 U.S.C. § 1001.

²⁰10 U.S.C. § 2306(f).

publish stories of expensive toilet seats, screws, and coffee-makers without all the facts and inflame the sensibilities of the public, forcing Congress to take some political action which can be used in future reelection campaigns. A discourse on the First Amendment this it not; however, somehow the cycle has to be broken and an end put to the Congressional micromanaging and layered legislation.

Make no mistake about it, things go wrong in public contracts and for a variety of reasons: contractors make mistakes, the Government makes mistakes, forces affect the contract that were not anticipated by either party, and both the Government and contractors misrepresent or fail to disclose information. The unfortunate result is that rather than working as a team, contractors and the Government find themselves in an increasing amount of litigation.

The impact of a shrinking defense budget means even the big contractors will be going after small contracts and every contractor will be going after all the money it can get, resulting in even more litigation. In the Department of Defense (DoD), contractors cannot keep pace with the procurement peaks and valleys of cutbacks and buildups, drawdowns and Desert Storms, not to mention the devastating terminations of such programs as the Navy's P-7 and the A-12. A recent study by the Center for Strategic Studies found that

the number of defense contractors dropped from 118,000 to 38,000 in the five year period from 1982-1987, and estimates that the shrinking defense budget will reduce that figure even more.²¹ Critics of the shrinking defense industrial base contend that only by keeping competition alive will the cost of weapon systems remain in check, while others are of the opinion that weapon systems have gotten so complex that how well a contractor will manage a program is becoming as important as which supplier has the lowest overall cost.²² Now more than ever, in these turbulent times, the Government (and DoD in particular) should be taking great pains to keep contractors informed of its plans to the greatest extent practicable.²³

The Duty of Good Faith and Fair Dealing

Much the same as the Government's duty to disclose cuts across the field of Government contracts, so do a number of implied

²¹*Defense Industry Slows, Contractors Fear Shakeout*, The Washington Post, May 13, 1991, at A1, col 6.

²²*Id.* (emphasis added).

²³Some of the most recent world events (the Persian Gulf, Germany, and China) happened so quickly that they defied prediction or the resulting impacts on the defense budget. For example, the Air Force 1992 to 1993 budget request canceled or delayed several major weapon systems procurements -- a reflection of the DoD scaleback to 4% of the gross national product by 1995 (the lowest level since the 1950s). *Plan Shows Less AF Procurement*, Air Force Times, Feb. 18, 1991, at 25, col. 1.

duties²⁴ -- the primary one being the duty of good faith²⁵ and fair dealing. As noted above, over the past 50 years the world of Government contracts has become more adversarial. With that comes more litigation and with more litigation there are more lawyers relying on old theories of recovery and creating new ones. In a recent article, Professor Nash asserted that while the duty of good faith and fair dealing has been common in private sector contracting, it is just now beginning to be used with some frequency in Government contracts.²⁶ This view has been supported by commentators who have found the duty of good faith and fair dealing to be subsumed in a number of other implied duties,²⁷ including the duty to provide accurate specifications, the duty to disclose superior knowledge, the duty of fairness in making a decision to terminate, and the duty to cooperate and not hinder

²⁴See Arnavas and Latham, *Implied Government Duties: Basic Principles and Guidelines*, Briefing Paper 83-8 (August 1983); Gould, Leonard and Gore, *The Government's Duty to Communicate--An Expanding Obligation*, 18 NCMA J. 45 (1984); and Nash and Cibinic, *Federal Procurement Law Volume II*, (3rd ed. 1980) at 1011.

²⁵"Good faith" means "honesty in fact in the conduct or transaction concerned." Restatement [Second] of Contracts, § 205 and comment a (1979).

²⁶See Nash, *The Duty of Good Faith and Fair Dealing: An Emerging Concept?*, 3 Nash & Cibinic Report (hereinafter "N & CR") ¶ 78, (November 1989).

²⁷Toomey, Fisher, and Curry, *Good Faith and Fair Dealing: The Well-Nigh Irrefragable Need for a New Standard in Public Contract Law*, 20 Pub. Cont. L.J. 87 (1990) at 109-114.

performance.²⁸

Historically, there has been a presumption that the Government acted in good faith -- a presumption founded on the concepts of sovereign immunity and the protection of the public fisc from frivolous claims.²⁹ In order to prove a breach of the duty of good faith and fair dealing, contractors have had to prove that the Government's actions were motivated by malicious intent.³⁰ Typically, this presumption required strong proof to be rebutted;³¹ however, there is some indication that the requirement for "well-nigh irrefragable proof" may be easing up.³² *Malone v. United States*³³ has been touted as a landmark case in this area, marking a departure from the need for contractors to show malice on the part of the Government.³⁴ The case involved a contract for the

²⁸See Nash *supra* note 26, citing *George C. Fuller Co. v. United States*, 108 Ct. Cl. 70, 60 F.Supp. 409 (1947). See also Nash, *Government Contract Changes*, (2d ed. 1989) at 12-1 for a complete discussion of interference and the failure to cooperate by the Government and its resulting impact as a constructive change.

²⁹Toomey, Fisher and Curry, *supra* note 27 at 91.

³⁰*Id.* at 93.

³¹*Seaboard Lumber Co. v. United States*, 19 Cl. Ct. 310, 9 FPD ¶ 9 (1989), *aff'd* 903 F.2d 1560 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 1308 (1991).

³²Toomey, Fisher, and Curry, *supra* note 27 at 119.

³³849 F.2d 1441 (Fed. Cir. 1988).

³⁴*Id.*

painting of base houses on an Air Force base in Georgia. The contract required the contractor to paint one house, and, with the contracting officer's approval, that standard was to be used for all the houses. Although the contracting officer disapproved the exemplar, he failed to inform the contractor who continued to paint and receive payments. After the contractor had performed approximately 70 percent of the contract, the contracting officer rejected the work. The Federal Circuit reversed the board, holding that the failure of the Government to communicate its dissatisfaction to the contractor was a material breach of the Government's duty of good faith and fair dealing and hence, a breach of the contract. The court made this determination without a mention of the need to show malicious intent.³⁵ Professor Nash refers to *Malone v. United States* as a case that indicates a need for "a higher standard of performance by the Government than would have been expected under prior legal theories,"³⁶ but apparently does not believe it will have a resounding effect on the law in this area.³⁷

³⁵Toomey, Fisher, and Curry, *supra* note 27 at 120.

³⁶See Nash, 3 N & CR ¶ 78, *supra* note 26.

³⁷*Malone v. United States* has had no substantial impact in this area. It was followed in *Discovery Corporation*, ASBCA 36130, 89-1 BCA ¶ 21,189 (1988) (failure to approve contractor's submittal within the time specified in the contract) and *Kahaluu Construction Co.*, ASBCA 31187, 89-1 BCA ¶ 21,308 (1988) (contracting officer's representative failed to give contractor directions in the face of a legitimate request from the contractor). Cf., *Fowler & Butts*, PSBCA 2545, 91-1 BCA ¶ 23,391 (1990) (lack of adequate proof that

A pre-Malone case illustrates one board's preference of using the breach of an implied duty to communicate instead of a nondisclosure analysis. In *Automated Service, Inc.*³⁸ the contracting officer knew and failed to inform the contractor that its proposed computer system would have to be extensively modified to meet the requirements of the contract. The board stated that it was "deeply troubled by the Government's dealings" with the contractor and that while its conduct "did not strictly run afoul of the 'superior knowledge' doctrine," the board held there was a breach of the Government's duty to communicate.³⁹ Clearly, the board could have decided the case based on the Government's failure to disclose superior knowledge; and, on the same facts today, *Malone* could be cited as authority for this breach of the duty of good faith and fair dealing.

The bottom line: Contractors will continue to allege the breach of an implied duty when a contractor believes that the Government has failed to disclose information to which it is entitled or misrepresented facts. As Professor Nash states:

The duty [of good faith and fair dealing] is here to stay in the law of Government contracting Further, it is almost inevitable that it will continue to make an impact on the legal rules

Government's action precluded compliance with the contract documents).

³⁸GSBCA EEOC-2 and EEOC-3, 81-2 BCA ¶ 15,303 (1981).

³⁹*Id.* at 75,762.

governing the procurement process. [It] is of such wide scope that it will be limited only by the imagination of litigants, and by the views of judges⁴⁰

This paper will explore the bounds of the Government's duty to disclose information in a variety of circumstances. Chapter II consists of summary of the current case law on affirmative false statements and nondisclosure of factual information. Chapter III will focus on the disclosure of information about a particular contractor to that contractor. Chapter IV examines the release of information to competitors. Finally, Chapter V looks at the current rules and regulations in effect regarding the disclosure of Government acquisition-related information to contractors.⁴¹

⁴⁰See Nash, 3 N & CR ¶ 78, *supra* note 26.

⁴¹Beyond the scope of this thesis are three areas that are critically interconnected with the disclosure of information: (1) the Freedom of Information Act (5 U.S.C. § 552, hereinafter "FOIA"); (2) the discovery rules for the different protest and disputes fora; and (3) debriefings [see, FAR 15.1003 and Cibinic, *Debriefing: Tell It Like It Is*, 4 N & CR ¶ 43 (July 1990)].

II. Misrepresentation⁴²

A. Introduction

Misrepresentation and nondisclosure are certainly not unique to Government contracting. Who can forget their first brush with these concepts in first year contracts class where we learned that while a party can be held liable for misrepresenting a material fact that forms the basis of a bargain, there is, generally, no liability for a bare

⁴²Background material for this chapter was gathered from the following sources whose organizational and informational contributions were both significant and greatly appreciated: (1) Sklute, *Government Misrepresentation and Non-Disclosure of Superior Knowledge in Federal Procurement*, 6 Pub. Cont. L.J. 39 (1973) as adapted from a thesis with the same title, dated 15 May 1972, presented to the National Law Center of The George Washington University in partial satisfaction of the requirements for an LL.M. degree in Government Procurement Law; (2) Hoover, *Government Affirmative Misrepresentation in Federal Contracting*, 25 A.F.L. Rev. 183 (1985); (3) Hoover, *Government Affirmative Misrepresentation and Non-Disclosure of Superior Knowledge in Federal Contracting*, September 1984, a thesis presented to the National Law Center of The George Washington University in partial satisfaction of the requirements for an LL.M. degree in Government Procurement Law (hereinafter referred to as "*Hoover Thesis*"); (4) Cibinic and Nash, *Administration of Government Contracts* (2d ed. 2d printing 1986) at 186-99, 267-68, and 388 - 90; (5) Latham, *Kaplan Contractors, Inc. and the Superior Knowledge Doctrine: What Must the Government Disclose and Why?*, 4 Pub. Cont. L.J. 191 (1971); (6) James and Gray, *Misrepresentation - Part I*, 37 Md. L. Rev. 286 (1977) and James and Gray, *Misrepresentation - Part II*, Vol 37 Md. L. Rev. 488 (1977); (7) and Vom Gaur, *Constructive Change Orders/Edition II*, Briefing Papers 73-5 (October 1973).

nondisclosure?⁴³ To this nondisclosure rule were the typical exceptions -- requiring disclosure if there was a fiduciary relationship or if a party told a half-truth.

The rules for Government contracts are much more complicated and slightly more liberal than in the commercial field. The business sector (the defense industry in particular) and the Government seem to be at constant odds -- industry searching to level the playing field they consider to be tilted against them. Clear rules are especially important in Government contracts since "because of its size, power, and potential ability to manipulate the market place, the Government may have obligations of fairness beyond those of the ordinary citizen" or contractor.⁴⁴ Perhaps rightfully so. One need only look to the cancellations of the P-7 and A-12 contracts to observe the potential life-and-death power the federal Government wields over the defense industry.

Further complicating the law here are the cases that tend to use any one of a number of theories⁴⁵ to get at the result

⁴³Recall *Swinton v. Whitinsville Sav. Bank*, 42 N.E.2d 808 (Mass. 1942) (seller of house failed to inform buyer of termite infestation).

⁴⁴*R & R Enterprises, IBCA 2417, 89-2 BCA ¶ 21,708 (1989) at 109,148.*

⁴⁵*E.g.*, the courts and boards often interchange the concepts of misrepresentation and warranty. *Cibinic and Nash*, *supra* note 42 at 179. See also *infra* note 87.

desired by the judges, making analysis difficult. Research indicates that the number of cases involving traditional breach of contract misrepresentation has dropped off somewhat, while the number of nondisclosure cases has remained unchanged. It would be nice to believe that the primary reason for the decline in misrepresentation cases is due to the quality recruitment and training of the federal procurement work force. However, it is probably as much due to the reluctance of parties to litigate an affirmative false statement where there is no question that an assertion was made (just what it meant), and due to the use of contract remedies clauses⁴⁶. Parties continue to aggressively pursue nondisclosure cases where more fertile litigation ground can be found as they battle over whether an assertion should have been made as well as its meaning and its resulting impacts.

Over the years authors have attempted to determine the relationship between the risk allocation concepts of misrepresentation and nondisclosure, the pivotal question being whether the nondisclosure of information is, in fact, a misrepresentation or whether failing to disclose information is, by itself, a separate defense used by parties to a

⁴⁶E.g., the Differing Site Conditions clause at FAR 52.236.2.

contract who consider themselves victimized.⁴⁷ One writer hinges the distinction on whether the nondisclosure of information results necessarily in an "implied erroneous representation"⁴⁸ -- if so, it is a misrepresentation. For example, if the Government provides documentation of test results, yet fails to include all the results of the tests, this nondisclosure creates an implied erroneous representation (as to the documents not disclosed) which constitutes a misrepresentation.⁴⁹ As another example, assume the Government possesses a document relevant to a procurement and represents that all information would be furnished upon request to the contractor. If the Government provides all the information it has, except that one document, the Government is rendered liable for misrepresentation.⁵⁰ Thus, if the facts do not reveal an express representation to which the failure to disclose can at least be implied, the case will, in all likelihood, be decided on a nondisclosure of superior knowledge theory.⁵¹

Another writer sees the distinction between nondisclosure and

⁴⁷See *supra* note 42, Latham, 4 Pub. Cont. L.J. 191 at 196; Hoover Thesis at 2; Sklute, 6 Pub. Cont. L.J. 39 at 39; and *supra* note 42, Cibinic and Nash at 186.

⁴⁸Sklute, *supra* note 42, at 40.

⁴⁹*Id.* at 44.

⁵⁰*Id.*

⁵¹*Id.* at 40.

misrepresentation differently⁵² -- concluding that misrepresentation is only applicable when there is an assertion; conversely, nondisclosure of superior knowledge is used only when no assertion has been made by the Government under circumstances indicating an obligation to do so.⁵³

Yet another author⁵⁴ seemingly agrees that there cannot be a misrepresentation without an assertion, but relies on the court's decision in *Helene Curtis Industries v. United States*⁵⁵ (equating specification silence to an assertion) to conclude that the withholding of superior knowledge is a form of misrepresentation.⁵⁶

Finally, Professors Cibinic and Nash are of the opinion that although both situations involving misstatements and nondisclosures are referred to as misrepresentations, the term "misrepresentation" is best used to refer solely to "affirmative misstatements."⁵⁷

⁵²Hoover, 25 A.F.L. Rev. 183 at 184, and *Hoover Thesis* at 2, both *supra*, note 42.

⁵³*Id.*

⁵⁴Latham, *supra* note 42 at 196.

⁵⁵160 Ct. Cl. 437, 312 F.2d 774 (1963).

⁵⁶Latham, *supra* note 42 at 196.

⁵⁷Cibinic and Nash, *supra* note 42 at 186.

The Restatement of Contracts defines "misrepresentation" as "an assertion that is not in accord with the facts";⁵⁸ however, this definition does not address the several other elements of affirmative false statements, including the requirements that the statement be material⁵⁹ to the contract, for Government culpability, and for reasonable, detrimental reliance caused by the representation.

As can be seen, like most areas of the law, there is certainly more than one way to examine this particular issue and the flow chart at Appendix A incorporates the expertise of these authors and case law to establish an "at a glance" overview of these two legal theories. This chart illustrates that although affirmative false statements and nondisclosures are both considered as parts of the law of "misrepresentation," they require different elements of proof, but the remedies are the same no matter which route is pursued. Nonetheless, affirmative false statements and nondisclosures are often confused as they have so much in common. They both require factual, material or vital information; they both require detrimental reliance; they both require (albeit minimal) Government culpability (in the case of nondisclosure this is

⁵⁸Restatement [Second] of Contracts § 159 (1979) [hereinafter, Restatement].

⁵⁹"A misrepresentation is material if it would be likely to induce a reasonable person to manifest ... assent, or if the maker shows that it would be likely to induce the recipient to do so." *Id.* § 162 (2).

established by the Government's knowledge that the contractor is unaware of some fact); and they both require the contractor's reliance to be reasonable (in the case of nondisclosure, the reasonableness of reliance⁶⁰ is based on an after-the-fact judgment as to whether the contractor would have done something different, had it known of the fact, which would have worked to the advantage of the contractor). On the other hand, the major difference between these two theories is that one involves making a false statement and the other involves not making a true statement when obligated to do so.

A final procedural note. Prior to the enactment of the Contract Disputes Act of 1978, the boards of contract appeals had jurisdiction only over disputes "arising under" but not "relating to" the contract. As such, boards could only entertain issues that could be resolved by resorting to the remedies clauses in the contract, such as the Differing Site Conditions or Changes clauses⁶¹ -- consequently, courts

⁶⁰See generally, *Hoover Thesis*, *supra* note 42 at 78-113 or 25 A.F.L. Rev. 183 at 225-238 (misrepresentation) and *Hoover Thesis* at 166-194 (nondisclosure).

⁶¹Cases involving subsurface or latent conditions or unknown physical conditions at the site are remedied under the Differing Site Conditions clause, *supra* note 46. Misrepresentations can also be remedied as constructive changes under the appropriate changes clause, provided the categorical limitations are met. FAR 52-243-1(a)(1)-(3) (fixed price supply and services contracts) and FAR 52.243-4(a)(1)-(4) (fixed price construction contracts). See *Noslo Engineering Corp.*, ASBCA 27120, 86-3 BCA ¶ 19,168 (1986). These areas are outside the scope of this paper.

decided misrepresentation cases.⁶² Since 1978, there has been a marked shift toward board resolution of these cases whether they are decided using a remedies clause or under a breach of contract theory.⁶³

With that in mind, a brief examination of the highlights of this area of the law will now be undertaken, concentrating on the most recent developments.⁶⁴

B. *Affirmative False Statements*

1. *The Information Must Be Factual*

For a representation to be actionable, it must be factual. An opinion is merely "a belief or judgment that rests on grounds insufficient to produce certainty."⁶⁵ Accordingly, contractors who care about losing cases do not normally litigate statements that appear to be opinions -- first of

⁶²See, Sklute, *supra* note 42 at 41.

⁶³To the extent that a contractor's claim is redressable as a breach of contract or pursuant to a contract clause, the contractor must pursue its remedy under the applicable contract clause.

⁶⁴For a more complete and detailed analysis of the law of misrepresentation prior to 1984, see the documents cited in note 42, *supra*, especially the exhaustive works by Sklute and Hoover.

⁶⁵The Random House Dictionary of the English Language 1010 (1973) and see *id.* § 168.

all, an opinion is rarely set forth in writing (resulting in further proof problems), and second, contractors have a difficult time establishing the reasonableness of reliance on opinions.⁶⁶ Akin to opinions are estimates, where the Government approximates its needs in a contract.⁶⁷ Tribunals tend to give more credence to estimates in fixed priced contracts, as opposed to estimates in requirements contracts.⁶⁸ No matter what type of contract is involved, if

⁶⁶See Hannelore Brown, ASBCA 23492, 83-1 BCA ¶ 16,305 (1983) (contracting officer's statement not a promise to award follow-on contract); Fleishman, KG, ASBCA 22708, 22801, 82-2 BCA ¶ 16,097 (1982) (contracting officer's statement concerning renewal of a lease not factual) and Loesch v. United States, 227 Ct. Cl. 34, 645 F.2d 905 (1981) (agency statements concerning the effects of new dams were opinions).

⁶⁷See Eastern Chemical Waste Systems, ASBCA 39463, 90-3 BCA ¶ 22,951 (contractor claimed Government grossly misrepresented the amount of excavation to be done and board held the estimate was only an estimate -- no negligence in estimate preparation); Second Growth Forest Management, Inc., AGBCA 85-118-3, 85-3 BCA ¶ 18,224 (contractor recovered for inaccurate Government estimate based on 9 year old data which caused contractor to have to trim more trees -- site inspection excused due to severe weather); Everett Plywood and Door Corp. v. United States, 190 Ct. Cl. 80, 419 F.2d 425 (1969) (quantity of timber recoverable was an exact representation); Cedar Lumber, Inc. v. United States, Cl. Ct., 2 FPD ¶ 183 (1984) (not a reasonable estimate); McGrew Brothers Sawmill, Inc. v. United States, 224 Ct. Cl. 740 (1980); and Womack v. United States, 182 Ct. Cl. 399, 389 F.2d 793 (1968).

⁶⁸See Atlantic Garages, Inc., GSBCA 5891, 82-1 BCA ¶ 15,479 (1982) (when the quantity required under a fixed price contract is impossible to determine and the contractor makes its bid/offer based on a Government estimate, then the Government is held closely to that estimate) and see also Sklute, *supra* note 42 at 49, citing Brawley v. United States, 96 U.S. 168 (1877) and Shader Contractors v. United States, 149 Ct. Cl. 535, 276 F.2d 1 (1960) (fixed priced contracts); comparing Micrecord Corp. v. United States, 176 Ct. Cl. 46, 361 F.2d 1000 (1966) and Comp. Gen. Dec. B-169037, unpub.,

a contractor knows before award that the Government estimate is faulty and informs the contracting officer, who refuses to change the estimate, the contractor may not rely on the estimate as stated.⁶⁹

2. *The Government's Representation Must Be Erroneous*

Although "error per se is not misrepresentation"⁷⁰ "[a]n inadvertent misrepresentation stemming from negligence is fully as damaging as a deliberate one to the party who relies on it to its detriment."⁷¹ This is rightfully so, for if the Government has no knowledge (or should have no knowledge) of a certain condition there should be no liability.

(May 4, 1970) (requirements contracts).

⁶⁹Excel Services, Inc., ASBCA 30565, 86-2 BCA ¶ 18,783 (1986).

⁷⁰Womack, *supra* note 67 at 801 (no misrepresentation where both parties exercised reasonable care in arriving at and testing the estimate).

⁷¹*Id.* at 800 (failure to exercise due care in detecting an error in an estimate was misrepresentation). See also, *Chris Berg v. United States*, 186 Ct. Cl. 389, 404 F.2d 464 (1968) (Government negligence in failing to consult meteorological experts concerning boundary of a typhoon zone) and *General Casualty Co. v. United States*, 130 Ct. Cl. 520, 127 F. Supp. 805 (1955), cert. denied, 349 U.S. 938 (1955) (no negligence on part of Government which took 35 ground samples, only tested 4, and disclosed the test results of the 4, but not the fact that 31 other samples were taken and not tested).

3. Contractor Reliance and Detriment

To successfully recover using the theory of misrepresentation, the contractor must show that it relied on the representation,⁷² that the reliance was reasonable⁷³ and that its reliance caused detriment.⁷⁴ Little litigation takes place over whether the contractor relied on the representation or whether the representation was, in fact, the cause of the contractor's damages.⁷⁵ Thus, the major area of contention here centers on the Government's defense that the contractor's

⁷²See *Sterling-Kates v. United States*, 12 Cl. Ct. 290, 6 FPD ¶ 58 (1987) (no reliance where contractor's inferences were unfounded); and *Sklute, supra* note 42 at 55, citing *T. F. Scholes, Inc. v. United States*, 174 Ct. Cl. 1215, 357 F.2d 963 (1966).

⁷³Reasonable reliance found in: *Summit Timber Co. v. United States*, 230 Ct. Cl. 434, 677 F.2d 852 (1982) (contractor entitled to rely on Government representation that it had marked correct acreage of timber to be cut); *Hardeman-Monier-Hutherson v. United States*, 198 Ct. Cl. 472, 458 F.2d 1364 (1972); *Womack, supra* at note 67; *Dale Construction Co. v. United States*, 168 Ct. Cl. 692 (1964); and *Levering and Garrigues Co. v. United States*, 73 Ct. Cl. 566 (1932). Unreasonable reliance found in: *Mallory Engineering, Inc., ASBCA 25509*, 82-1 BCA ¶ 15,613 (1982); *Microrecord Corp. v. United States*, 176 Ct. Cl. 46, 361 F.2d 1000 (1966); *Morrison-Knudson Co. v. United States*, 170 Ct. Cl. 712, 345 F.2d 535 (1965); *Hunt and Willett, Inc. v. United States*, 168 Ct. Cl. 256, 351 F.2d 985 (1964); and *Flippin Material Co. v. United States* 160 Ct. Cl. 357, 312 F.2d 408 (1963).

⁷⁴See e.g., *Maintenance Engineers, Inc. v. United States*, 21 Cl. Ct. 553, 9 FPD ¶ 139 (1990) (contractor bears the burden of proving reliance -- no reliance where no correlation between inaccurate Government information and impact on performance) and *WRB Corp. v. United States* 183 Ct. Cl. 409 (1968).

⁷⁵*Sklute, supra* note 42 at 55.

reliance on the representation was not reasonable.⁷⁶ This defense can take many forms, but focuses on the fact that if the contractor either knew or should have known that the representation was false, then its reliance was unreasonable.⁷⁷ The standard for determining reasonableness of reliance is to determine what a reasonable contractor would have done with knowledge common to the industry.⁷⁸ The courts and boards have done a fine job of allocating risks in these situations -- contractors should not be able to use claims of misrepresentation as a shield to protect them from poor business decisions.

Likewise, reliance in the face of a disclaimer or warning may not be reasonable.⁷⁹ Broad, generalized Government

⁷⁶*Id.* at 56.

⁷⁷*Id.* citing *L.M. Jones v. United States*, 178 Ct. Cl. 636 (1967) (contract phrase "temporary impoundment" relied on by contractor to mean "no flooding" was unreasonable where other portions of the contract indicated flooding was possible). See also *Hollerbach v. United States*, 232 U.S. 165 (1914) (reasonable reliance found where Government specifically represented soil composition, despite general disclaimer which included "all other contingencies"); *Woodcrest Construction Co. v. United States*, 187 Ct. Cl. 249, 408 F.2d 406 (1969) (reliance unreasonable despite Government's failure to disclose subsurface water as contractor had viewed other projects in the area which indicated, among other things the existence of subsurface water).

⁷⁸*Gregory Lumber Co. v. United States*, 11 Cl. Ct. 489, 503 (1986), *aff'd*, 831 F.2d 305 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1061, 108 S.Ct. 1016 (1988) (common timber industry knowledge that estimates are underruns and contract had an effective disclaimer).

⁷⁹*Id.*

disclaimers⁸⁰ will not normally be effective as a defense against a claim of misrepresentation;⁸¹ however, if the disclaimer is drafted specifically for a certain circumstance, it will usually be upheld,⁸² although matters outside the scope of the disclaimer will be considered accurate.⁸³

A contractor is deemed to have knowledge which would have been apparent from a reasonable site investigation, or, if the contractor failed to conduct a site investigation, the contractor will be charged with the knowledge it would have gleaned had it conducted a reasonable site investigation.⁸⁴

Finally, contractors cannot successfully assert a claim of

⁸⁰See Hoover, *supra* note 42, at 232 for a catalog of the types of disclaimers generally found in Government contracts. See also Pettit, *Government Disclaimers of Liability*, Briefing Papers 77-5 (October 1977).

⁸¹See e.g., *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920); *United Contractors v. United States*, 177 Ct. Cl. 151, 368 F.2d 585 (1966); *Felhaber Corp. v. United States*, 138 Ct. Cl. 571, 151 F.Supp 817 (1957); and *Flippin Materials Co. v. United States*, 160 Ct. Cl. 357, 312 F.2d 408 (1963).

⁸²See e.g., *Teledyne Lewisberg v. United States*, 699 F.2d 1336 (Fed. Cir. 1983); *Archie and Allen Spiers, Inc. v. United States*, 155 Ct. Cl. 614, 296 F.2d 757 (1961) and *Arvin Industries, Inc.*, ASBCA 15215, 71-2 BCA ¶ 9143 (1971).

⁸³See *Thompson Ramo Wooldridge, Inc. v. United States*, 175 Ct. Cl. 527, 361 F.2d 222 (1966).

⁸⁴*Tri-Ad Constructors*, ASBCA 34732, 89-1 BCA ¶ 21,250 (1989); *Metroplex Industrial Contractors, Inc.*, ASBCA 26242, 82-1 BCA ¶ 15,749 (1982); *Swepeco Corp.*, ASBCA 25118, 81-2 BCA ¶ 15,262 (1981); and *Mojave Enterprises*, AGBCA 75-114, 77-1 BCA ¶ 12,337 (1977).

misrepresentation without having consulted all the contracts documents available to it⁸⁵ or information reasonably available from sources outside the Government.⁸⁶ Reliance can be unreasonable if a contractor fails to perform a site inspection.

C. Nondisclosure of Information

In the past, the traditional concept of nondisclosure of information was referred to as the failure on the part of the Government to disclose "superior knowledge;" however, the term "nondisclosure of factual information" better describes this situation. Nondisclosure of factual information has its roots in many legal theories.⁸⁷ That the Government can be liable

⁸⁵See *F.E. Constructors*, ASBCA 23003, 82-2 BCA ¶ 16,119 (1982); *L.M. Jones Co.*, *supra* note 77; and *Flippin Materials Co.*, *supra* note 81.

⁸⁶See *Max Jordan Bauunternehmung v. United States*, 10 Cl. Ct. 672, 5 FPD ¶ 85 *aff'd*, 820 F.2d 1208 (Fed. Cir. 1987) (the Government is under no obligation to volunteer information that is reasonably accessible from other sources). See also, *infra* notes 96, 97.

⁸⁷See Latham, *supra* note 42 at 200, where he refers to four: (1) the law of misrepresentation; (2) the rule that if one party has knowledge of another's interpretation he will be bound by it; (3) that by failing to disclose information the Government assumes the risk of impossibility of performance; and (4) that nondisclosure can be a breach of the Government's duty to cooperate and not hinder performance [e.g., *Automated Services Inc.*, BCA GSBCE EEOC-2 & 3, ¶ 15,303 (1981)]. See also Nash, *supra* note 28 at 14-7, referring to both the implied warranty that information is complete and reliance on the rule set forth in *Helene Curtis Industries*, *supra* note 55. For a full discussion of nondisclosure cases resolved via constructive changes, see Nash at 14-1ff.

for the nondisclosure of factual information was clearly set forth in the case of *Helene Curtis Industries*,⁸⁸ and its progeny which established the following elements of proof necessary to successfully assert a nondisclosure claim:⁸⁹

1. The Government knew or had reason to know of vital or material factual information;
2. The Government knew or had reason to know the contractor had no knowledge of the information;
3. The contractor had no knowledge or reason to know of the information; and
4. Nondisclosure caused detriment to the contractor.

1. Vital/Material Information

As with affirmative false statements, the Government is not required to disclose any and all information -- just facts considered material⁹⁰ or vital to the performance of the contract.⁹¹ Likewise, as with the discussion of affirmative

⁸⁸*Supra* note 55.

⁸⁹See also *Sklute*, *supra* note 42 at 72; *Hoover Thesis*, *supra* note 42 at 123ff; and Appendix A.

⁹⁰See *supra* note 59.

⁹¹See, e.g., cases holding information not material: *Al Johnson Construction Co. and Massman Construction Co. v. United States*, 19 Cl. Ct. 732, 9 FPD ¶ 61 (1990) (in a water control construction contract, Government withholding of a

false statements, this would not include opinions, and it has been held that estimates need not be provided when a contractor is given all the information compiled to arrive at the estimates.⁹²

2. Information Must Be Factual

Nondisclosure situations arise when the Government possesses

report on a construction site one mile away and with different ground characteristics was not material); Alabama Dry Dock and Shipbuilding Corp., ASBCA 39215, 90-2 BCA ¶ 22,855 (1990) (although Government disclosed that a hertz inverter was a sole source item, the newness of the item was not vital as the contractor had a duty to inquire as to its availability); McCormick Construction Co. v. United States, 12 Cl. Ct. 496, 6 FPD ¶ 83 (1987) (no breach of duty to disclose for failing to provide drilling logs as logs did not contain information that was of significance to anyone other than an expert); Bromley Contracting Co., GSBCA 6965, 85-3 BCA ¶ 18,428 (1985) (Government knowledge that obtaining slate within the contract period of 100 days would be difficult was not material despite the fact that the Government knew who the supplier was and had a letter from a prospective bidder advising the agency that the item would be hard to get); and T.C. James and Co., ENG BCA 5328, 89-2 BCA ¶ 21,643 (1989). See e.g., case holding information to be material: Tripod, Inc., ASBCA 25104, 89-1 BCA ¶ 21,305 (1989) (food service contract that shifted to the contractor the risk of variations in the number of meals was not applicable when the IFB called for service of one Mexican dinner a week and failed to indicate the popularity).

⁹²See, e.g., *Sayco Ltd.*, ASBCA 36534, 89-1 BCA ¶ 21,319 (1988) [Government motion for summary judgment denied where the contractor alleged that the agency negligently (or even intentionally) failed to disclose its estimate of the number of units it expected to purchase in the out-years when negotiating a lump-sum payment under a value engineering change proposal]; *L.G. Everist, Inc. v. United States*, 231 Ct. Cl. 1013, (1982), cert. denied, 461 U.S. 957 (1983) (no recovery for failure to disclose opinion where contractor could have verified information but declined to do so); *T.F. Scholes, Inc.*, 174 Ct. Cl. 1215, 357 F.2d 963 (1966) and *Womack*, *supra* at note 67.

special factual knowledge, not shared with the contractor, which is vital or material to the performance of the contract, thereby placing on the Government an affirmative duty to share such knowledge.⁹³ Specifically,

Superior knowledge does not mean that the Government knows more about a subject than does a particular contractor. Rather it means that the Government knows some fact that is not known or otherwise available to the industry concerned; knows, or should know, that the prospective bidders and contractors do not know, and cannot learn of, such fact other than from the Government and needs it in order to submit an informed and reasonable bid and to perform the contract; and withholds or fails to disclose it to bidders and contractors.⁹⁴

As with affirmative false statements a major concern here is whether the contractor has knowledge of the matter or should

⁹³Active Fire Sprinkler Corp., GSBICA 5461, 85-1 BCA ¶ 17,868 (1984) (recovery allowed for failure to disclose information concerning the existence of asbestos after balancing the agency's duty to disclose against the contractor's duty to inquire). See also, Hardeman-Monier-Hutcherson, *supra* note 73 (recovery allowed for failure to disclose reports on weather and sea conditions); Aerodex, Inc. v. United States, 189 Ct. Cl. 344, 417 F.2d 1361 (1969) (recovery for failure to disclose unavailability of part); and J.A. Jones Construction Co. v. United States, 182 Ct. Cl. 615, 390 F.2d 1361 (1969) (recovery for Government failure to inform contractor of potential increase in wage rates due to other Government projects awarded in the same area).

⁹⁴Drillers, Inc., EBCA 358-5-86, BCA 90-3 ¶ 23,056 (1990) at 115,747. In this case, the board at n. 13 states that contractors need not prove that the Government knew or should have known of the contractor's ignorance as that element is subsumed in the others. Cf. elements at p. 30, *supra*, Appendix A *infra*, and J.A. Jones Construction Co., *supra* note 93 (another essential element of the *Helene Curtis Industries* case is the Government's knowledge of the contractor's ignorance).

have reason to know of it. If so, there is no duty to disclose and any claim on that ground will fail.⁹⁵ Consequently, if the Government can show that the contractor could have reasonably obtained the knowledge from another source,⁹⁶ or if such knowledge was common throughout the industry,⁹⁷ the Government will not be rendered liable.

In *Drillers, Inc.*,⁹⁸ the parties entered a contract without a Differing Site Conditions clause for the construction of cavern wells for the national Strategic Petroleum Reserve.

⁹⁵See Dewey Electronics Corp., ASBCA 33869, 33870, 91-1 BCA ¶ 23,443 (1990) (contractor cannot claim the Government failed to disclose defects in the design of radiation dosimeters where the designer of the dosimeter was employed by the contractor).

⁹⁶See Hobbs, Construction and Development, Inc., ASBCA 34890, 91-2 BCA ¶ 23,755 (1991) (Government was not obligated to disclose an article that appeared in a trade publication as the information was as available to the contractor as it was to the Government and the article appeared 10 months after award); Robin C. Uhde, AGBCA 90-117-1, 91-1 BCA ¶ 23,720 (1991) (no duty to disclose severe weather conditions at the jobsite when information was equally available to the contractor); and Haas and Haynie Corp., GSBGA 5530, 84-2 BCA ¶ 446 (1984).

⁹⁷See Johnson & Son Erector Co., ASBCA 23689, 86-2 BCA ¶ 18,931 (1986) (knowledge of the federal and state emission standards was a matter of public record and generally available within the air pollution control industry); H.N. Bailey & Associates v. United States, 196 Ct. Cl 166, 449 F.2d 376 (1971), *Intercontinental Manufacturing Co.*, *supra* note 370; and Utility Contractors, Inc. v. United States, 8 Cl. Ct. 42, (1985), *aff'd without published opinion*, 790 F.2d 90 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 827 (1986) (contractor had access to same information as the Government regarding rainfall and hydrology).

⁹⁸*Supra* note 94.

The contractor alleged the Department of Energy breached the contract by its failure to disclose superior knowledge concerning the presence of hydrogen sulfide (H₂S) at the site in corrosive concentrations resulting in damage to the contractor's drill and associated delays. In an opinion that exemplifies a board's ability to balance the equities, the Energy Board held that although the agency knew of the presence of H₂S from an earlier contract, the Government's duty to disclose was outweighed by the contractor's failure to either conduct an adequate site investigation or consult an extensive site report (available at and after the pre-bid conference) which was replete with the possible existence of H₂S.⁹⁹

In another recent case¹⁰⁰ a contractor had supplied the Navy with asbestos insulation products and, after being sued by an employee for disabilities resulting from the asbestos in which he recovered \$10,000, the contractor sought indemnification from the Government. The court refused to extend *Helene Curtis Industries*¹⁰¹ to obligate the Government to inform a contractor that its products were harmful, as that would require the Government to make a determination as to what the

⁹⁹*Id.*

¹⁰⁰*Albert Lopez v. United States*, 858 F.2d 712 (Fed. Cir. 1988), 7 FPD ¶ 121 (1988).

¹⁰¹*Supra* note 55.

contractor did not already know.

Many other things will impact a determination of contractor knowledge. For example, whether the Government's knowledge is superior will be dependent on the extent to which the contractor conducted a reasonable site investigation,¹⁰²

¹⁰²See *Drillers, Inc.*, *supra* note 94; Wayne Construction, ENG BCA 4942, 91-1 BCA ¶ 23,535 (1990) (Government had no duty to disclose knowledge of rock quality in a Government-owned quarry as it could have been determined visually in pre-bid site investigation); *Tri-Ad Constructors*, *supra* note 84 (site visit would have revealed need for 38,076 feet of cable instead of contractors estimate of 18,000 feet); Structural Painting Corp, ASBCA 36813, 89-2 BCA ¶ 21,605 (1989) (failure to perform a site inspection was negligence); Bowie and K Enterprises, Inc., IBCA 1788, 87-1 BCA ¶ 19,338 (1986) (bare withholding of knowledge or information by the Government is not misrepresentation if the contractor fails to make reasonable inquiries contemplated by the site provisions of the contract and if such investigation would have disclosed the erroneous or misleading nature of the matter); ECOS Management Criteria, Inc., VABCA 2058, 86-2 BCA ¶ 18,885 (1986) (no duty to disclose the existence of interstitial floors in an energy audit contract where the contractor could have discovered the floors by reasonable investigation); Markey Construction Co., VABCA 2019, 2200, 85-3 BCA 18,425 (1985) (room could have been located by a reasonable site investigation -- no Government misrepresentation for not disclosing it in the contract documents); William D. Kyle, AGBCA 29194, 29924, 85-2 BCA ¶ 18,105 (1985) (contractor too busy to inspect assumed risk that site access by a poor road might impede performance); *Klingensmith v. United States*, 703 F.2d 583 (Fed. Cir. 1982); *Kirk L. Whitcombe*, AGBCA 77-184, 79-1 BCA ¶ 13,734 (1979) and *Key, Inc.*, IBCA 690-23-57, 68-2 BCA ¶ 7385 (1968) *mot. for reconsid. denied*, 69-1 BCA ¶ 7447 (1969). But cf., *C.M. Moore Div., K.S.H., Inc.*, PSBCA 1131, 85-2 BCA ¶ 18,110 (1985) *recon. denied*, 86-1 BCA ¶ 18,573 (1986) (even though the contractor inspected the Government furnished property and the contract contained an "as is" clause, the contractor recovered for the Government's failure to disclose when it knew the property would have to be modified to function on the contractor's equipment).

the size, experience and abilities of the contractor,¹⁰³ and the information and warnings in the contract documents.¹⁰⁴

¹⁰³See *Edwards, Edwards and Dixon v. United States*, 19 Cl. Ct. 663, 9 FPD ¶ 34 (1990) (construction of one other postal facility rendered contractor "experienced" and not entitled to rely on any Postal Service representations regarding the square footage required for the current project); *Numax Electronics, Inc.*, ASBCA 29090, 90-1 BCA ¶ 22,280 (1989) (Government's duty to disclose was greater as contractor was a small business concern); *Gulf & Western Industries, Inc.*, ASBCA 21090, 87-2 BCA ¶ 19,881 (1987) (at least two other contractors had experience in the tasks involved so knowledge was not exclusive with the Government); *William D. Kyle, supra* note 102 (contract documents indicated closest truck access to site 8 miles away -- contractor assumed risk of bad road by not reading the contract documents and by not inspecting); *Tyroc Construction Corp.*, EBCA 210-3-82, 84-2 BCA ¶ 17,308 (1984); *Johnson Electronics, Inc.*, ASBCA 9366, 65-1 BCA ¶ 4628 (1964); *General Dynamics Corp.*, ASBCA 13001, 71-2 BCA ¶ 9161 (1971); and *Mills v. United States*, 187 Ct. Cl. 696, 410 F.2d 1255 (1969) (even an elderly uneducated widow is not entitled to rely on Government representations as to the law pertaining to her contract with the Government).

¹⁰⁴See *Edwards, Edwards and Dixon, supra* note 103 (IFB gave express warning that "bidder shall be responsible for all action necessary to obtain zoning" and Nags Head zoning ordinance was not superior knowledge as it was a matter of public record); *Industrial Constructors Corp.*, AGBCA 84-348-1, 90-1 BCA ¶ 22,767 (1990) (in a contract for the repair of a dam, there was no failure to disclose the presence and pressure of groundwater as the information was generally available or could have been obtained from public records, including the original plans for the dam); *P&M Cedar Products, Inc.*, ASBCA 89-167-1, 90-1 BCA ¶ 22,444 (1989) (claim for increased costs caused by greater road use than anticipated was denied as contractor had access to and had consulted documents that reflected the traffic flow -- the contractor relied on some contract documents but not others); *Drillers, Inc.*, *supra* note 94 (absence of a Differing Site Conditions clause from a contract puts the risk on the contractor of conditions it should reasonably anticipate); *Young Enterprises, Inc.*, ASBCA 34138, 89-3 BCA ¶ 22,061 (1989) (no duty to disclose that a part was a sole source proprietary item as that information was available from other sources); *Luneth Plumbing and Heating Co.*, ASBCA 25332, 81-1 BCA ¶ 15,063 (1981); *Haas & Haynie Corp.*, GSBGA 5530, 6224, 6638, 6919, 6920, 84-2 BCA ¶ 17,446 (1984); *Kaufman DeDell Printing, Inc.*, ASBCA 19268, 75-1 BCA ¶ 11,042 (1975); and *National*

One of the more perplexing recent cases in the area of nondisclosure is *Petrochem Services, Inc.*¹⁰⁵ In a contract for the clean-up of an oil spill from a storage tank on a Navy base, the Government failed to include its 21,076 gallon spill estimate which was easily determined by assessing the amount of oil missing from the base's inventory. Prior to award, Petrochem sent a representative (a Mr. Vehrs) to the site to determine how much oil had spilled. During the inspection, in which he was accompanied by the drafter of the technical specifications (a Mr. Smith), Mr Vehrs estimated a spill of only 6,000 gallons, but was told by Mr. Smith that the spill was closer to 21,000 gallons. What was unclear; however, is whether Mr. Vehrs heard what Mr Smith told him and chose to ignore it or whether he didn't hear it at all. Not surprisingly, when Petrochem commenced performance, it found Mr. Vehrs' estimate to be 15,000 gallons low and filed a claim seeking an equitable adjustment of \$27,421.13 alleging the Government failed to disclose its superior knowledge. The court agreed with the board that the disclosure of information can be made orally, but reversed the board as no evidence had been presented at trial "either that the oral communication had been made, heard, and *understood*, or that [the Navy] had done its best to achieve this result."¹⁰⁶

Radio Co., ASBCA 14,707, 72-2 BCA ¶ 9486.

¹⁰⁵837 F.2d 1076 (Fed. Cir. 1988), 7 FPD ¶ 6.

¹⁰⁶*Id.* at 7 FPD ¶ 6 at 12 (*emphasis added*).

Unfortunately the court's decision is confusing and internally inconsistent. For example, the court states that "[i]t is undisputed that appellant was orally told by Mr. Smith the amount of oil lost,"¹⁰⁷ but thereafter states that the Government has done all it can if it gets the information out loudly and clearly¹⁰⁸ without a mention of the requirement for understanding. Then again, the court states that in order to prevail the Government must show that Mr Vehrs "absorbed, digested, and comprehended" the import of the statement by Mr Smith.¹⁰⁹ As the court found, there was no question that Mr. Vehrs was orally informed of the Navy's spill estimate, but what is troubling here is the uncertain burden the court puts on the Government to ensure that Mr. Vehrs understood what was said to him. The court was struggling with two issues -- on the one hand as a matter of policy, it wanted to affirm the board's determination that the Government be able to orally disclose superior knowledge¹¹⁰ but, on the other hand, it had to balance the Government's negligence in failing to disclose the estimate (a very vital piece of information under these

¹⁰⁷*Id.* at 8.

¹⁰⁸*Id.* at 10.

¹⁰⁹*Id.* at 12.

¹¹⁰*Cf.* R.G. Pitts, Inc., ASBCA 37816, 89-3 BCA ¶ 22,245 (1989) (oral information not sufficient to discharge the Government's duty to disclose where the contract was for the construction of an underground storage tank, and the contractor had inspected the site, but had failed to ask about road load limits -- the failure to ask did not override the Government's duty to disclose).

circumstances) in the contract documents. The result is that this burden to show "understanding" of a statement as to something so simple as the amount of oil in a berm should effectively result in written disclosure of anything requiring disclosure.¹¹¹

The only case following *Petrochem Services Inc.* to date is *R & R Enterprises*,¹¹² where the board found that a Government official's oral disclosure of a planned water and sewer project in a national park did not meet the test of *Petrochem Services, Inc.* as the communication was not made in such a manner as to alert a concession contractor to the adverse consequences of the project on the resort's business. In *R & R Enterprises*, the board found that although there had been conversations concerning the planned project, no one "specifically warned" the contractor before award.¹¹³ Thus, on stronger facts than *Petrochem Services, Inc.*, the board upheld the Government's authority to orally disclose, but did not push the "understanding" requirement nearly as far.

¹¹¹Had the Government included the 21,000 gallon estimate in the contract or sent Petrochem a written estimate, there is no question the court would not have required the Government to show that the contractor read and understood the documents.

¹¹²*Supra* note 44.

¹¹³*Id.* at 109,145.

3. Knowledge of the Government

It is possible that the Government may have information which is vital, yet not be liable for its nondisclosure.¹¹⁴ Then there are the cases where the Government or the contractor is clearly at fault, yet each attempts to avoid the consequences of a bad decision.¹¹⁵ The burden is on the contractor to prove the Government failed to disclose factual information¹¹⁶

¹¹⁴*Servidone Construction Corp. v. United States*, 19 Cl. Ct. 346, 9 FPD ¶ 12 (1990) *aff'd* 1991 U.S. App. LEXIS 6974 (Apr. 24, 1991) (no breach of contract and recovery for contractor where Government did not recognize from the charts it had compiled that soil conditions were so unusually compacted).

¹¹⁵*See Gould Inc. v. United States*, 19 Cl. Ct. 257, 9 FPD ¶ 3 (1990) (Navy did not withhold information on the amount of design work needed to produce radios), *vacated and remanded*, 1991 U.S. App. LEXIS 11829 (Jun. 7, 1991). *Cf.*, *Transtechology Corporation, Space Ordnance Systems Division v. United States*, 22 Cl. Ct. 349, 9 FPD ¶ 145 (1990) [in a contract for the production of infrared countermeasures flares, the Government breached its duty to disclose when, although called for in design specifications, the use of ground magnesium would not produce the desired results -- what the Government was really after was a research and development contract (at least in part)]; *Aulson Roofing, Inc., ASBCA 37677, 91-2 BCA ¶ 23,720* (1991) (contractor denied recovery for claim that Government had superior knowledge of wind conditions at the jobsite that blew over the contractor's trailer on two occasions -- contractor took no precautions after the first blowover); and *IBI Security Services, Inc. v. United States*, 19 Cl. Ct. 106, 8 FPD ¶ 144 (1989) (Government not liable for failing to disclose that a price adjustment clause was omitted from a contract).

¹¹⁶*See GAF Corp. v. United States*, 19 Cl. Ct. 490, 9 FPD ¶ 18 (1990) *aff'd* 1991 U.S. App. LEXIS 8702 (May 8, 1991) (no duty to disclose superior knowledge to asbestos manufacturer as contractor failed to show the Government had superior knowledge); *Universal Contracting and Brick Painting Co. v. United States*, 9 FPD ¶ 44 (1990) (Government motion for summary judgment denied where factual dispute existed over

and this may involve imputing knowledge from one agency of the Government to another. The standard rule here is that unless there is some meaningful connection between the two agencies, knowledge will not be imputed.¹¹⁷ The predominant view is to consider the totality of the surrounding circumstances and to not impute knowledge absent specific facts that one agency

Government's duty to disclose asbestos content of paint in a removal contract); Sanders Construction Co., IBCA 2309, 90-1 BCA ¶ 22,412 (1989) (contractor proved Government withheld superior knowledge of a dam which had not been properly maintained, resulting in an unanticipated amount of sediment buildup); Wilner Construction Co., ASBCA 25719, 83-2 BCA ¶ 16,866 (1983); and P.J. Maffei Building Wrecking Corp. v. United States, 732 F.2d 913 (Fed. Cir. 1984). Finally, there are cases that bridge both the contractor knowledge and the Government knowledge areas. See Lionsgate Corp., ENG BCA 5391, 5409, 5419, 5446, 91-1 BCA ¶ 23,368 (1990) (contractor failed to prove either that the Government knew or that the contractor did not know of the difficulties in working with drain materials in a flood control channel contract).

¹¹⁷See cases finding no imputation: Hawaii Dredging and Construction Co., ASBCA 25594, 84-2 BCA ¶ 17,290 (1984) (from Department of Labor to Department of Navy regarding changes to regulations covering alien workers on Guam); Unitec, Inc., ASBCA 22025, 79-2 BCA ¶ 13,923 (1979) (from Army Corps of Engineers to Army airfield representatives); S.T.G. Construction Co. v. United States, 157 Ct. Cl. 409 (1962) (from one military service to another); Bateson-Stolte, Inc. v. United States, 158 Ct. Cl. 455, 305 F.2d 386 (1962) (from Atomic Energy Commission to Army Corps of Engineers); and L'Enfant Plaza Properties, Inc. v. United States, 227 Ct. Cl. 1, 645 F.2d 886 (1981) (from General Services Administration to District of Columbia Redevelopment Land Agency). Cases finding imputation: J.A. Jones Construction Co., *supra* note 93 (Army Corps of Engineers acting like the construction "agent" of the Air Force); LogiMetrics, Inc., ASBCA 28516, 84-3 BCA ¶ 17,593 (1984) (from one Navy office to another where three Navy offices possessed the information and the contracting officer knew both of the information and that the contractor had requested it); and Cryo-Sonics, Inc., ASBCA 11483, 66-2 BCA ¶ 5890 (1966) (knowledge of one Air Force command imputed to another due to a report which identified an engineer in the other command).

actually knew (or should have known) of the matter at issue.

Imputation arguments can even cross over into the legislative area. In *Intelcom Support Services, Inc.*,¹¹⁸ the Government's motion for summary judgment was granted where the contractor failed to show a genuine issue of material fact that the Government knew, prior to award, of an impending tax increase.

4. Detriment

No matter what the Government fails to disclose, be it the most vital piece of information the contractor needs to perform, so long as the nondisclosure does not detrimentally affect the contractor, there can be no recovery.¹¹⁹ The contractor has the burden of showing that but for the Government's withholding of the material information it would have altered its course of action in some manner that would have lessened the adverse impact.¹²⁰

¹¹⁸ASBCA 36815, 90-2 BCA ¶ 22,767 (1990).

¹¹⁹See *Helene Curtis Industries*, *supra* note 55 and *Imperial Agriculture Corp. v. United States*, 147 Ct. Cl. 532 (1959). See also *Nash*, *supra* note 87 at 14-8, citing *Johns-Manville Corp. v. United States*, 13 Cl. Ct. 72 (1987), 6 FPD ¶ 105 (1987) for the proposition that there must be a direct cost impact of performing the contract to recover for nondisclosure.

¹²⁰See *Pacific Western Construction, Inc.*, DOTCAB 1084, 82-2 BCA ¶ 16,045 (1982), *recon. denied*, 83-1 BCA ¶ 16,337 (1983) and *Helene Curtis Industries*, *supra* note 55.

D. Conclusions

As mentioned earlier, the major movement in this area involves nondisclosure of factual information. The latest breaking case and probably the "mother of all" nondisclosure cases is the recent challenge by the McDonnell-Douglas and General Dynamics Corporations which have filed suit in U.S. Claims Court seeking to overturn the default termination on the \$4.8 billion A-12 contract.¹²¹ Among other things, the contractors allege: (1) the Navy breached its obligation "to share with the Contractors data within the government's possession that were vital to the Contractors' performance of the [contract], to deal with the Contractors in good faith, and to cooperate and not to hinder the contractors' performance;" (2) the Navy knew the projected performance of the A-12 would not meet contract specifications and failed to disclose it; and (3) the Navy failed to disclose information learned from other contracts regarding the development of propulsion systems that caused the contractors to have to reinvent known technology.¹²² Needless to say, this is a case that will be around for quite some time and its impact on the law in this area will certainly merit attention.

Finally, several points become apparent after a review of the

¹²¹See 55 FCR 867.

¹²²*Id.*

affirmative false statement and nondisclosure cases. Generally, these cases normally arise out of misunderstandings or miscommunications -- they simply do not rise to the level and complexity of such major performance disputes as cost or pricing issues, delays, terminations and the like. Most of the cases in this area can be traced either to the negligence (or an occasional intentional act) of one of the parties to the contract. Rare is the case where both sides are equally at fault -- if that happens the courts and boards typically resort to the traditional rules of risk allocation and contract interpretation and balance, for example, the Government's duty to disclose with the contractor's duty to inquire,¹²³ and may even fall back on a joint/comparative negligence analysis. More typically, however, is the case where there is obvious fault on one side -- normally, the Government has made an error in failing to disclose or by disclosing incorrect information, or the contractor is trying to make up for a mistake in business judgment. Often it appears litigation is the only way out of these situations, as once the claim is filed and "the system" takes over -- litigation takes on its usual life of its own and the parties to the dispute internalize the issues, losing sight of what

¹²³See e.g., *Drillers, Inc.*, *supra* note 94 and *Active Fire Sprinkler Corp.*, *supra* at note 93 and *Hof Construction, Inc.*, GSBICA 7012, 84-3 BCA ¶ 17,561 (1984) (when Government's duty to disclose conflicts with the contractor's duty to inquire, the balance is struck in favor of disclosure).

really matters -- the business aspects of the process.¹²⁴ Litigation is the antithesis of good business -- it is expensive, time consuming and often not productive. Government agencies need to continue to actively pursue the creation of an ombudsman position at all major procurement levels or offices to attempt to resolve matters before a claim is filed, or shortly thereafter. Beyond that, use of alternative dispute resolution procedures seems like the most logical option.

¹²⁴The issue is not whether you win or lose ... it is whether the Government gets what it contracted for on time and whether the contractor gets paid.

III. Disclosure of Information About a Contractor -- To That Contractor

In a perfectly logical world, it would seem that there would be no reason for the Government not to provide information about a contractor to that contractor. Such disclosure does two things. First, it fosters a spirit of trust and cooperation with industry that might go a long way to preventing later litigation. Second, disclosure of information improves the quality of the procurement system by allowing a contractor more information to improve its future proposals, thereby improving the contractor's chances of gaining award of the contract with the further benefit of providing the Government with an offer that requires less evaluative effort.

Unfortunately, the Government does not always disclose all the information that it should. This may be true for a variety of reasons including not knowing the "rules" for nondisclosure, misunderstanding the rules, or fear of compromising the Government's bargaining position or the integrity of the system. Often, failing to disclose information is a byproduct of what the parties tragically perceive to be an adversarial process, rather than a mutually reinforcing arm's length transaction whereby the contractor gets money and the Government gets a product or service. This chapter examines particular instances where information about a particular

contractor is and is not released to the contractor which is the subject of the information. The next chapter deals with the disclosure of information about a particular contractor to actual or potential competing contractors.

A. Responsibility Determinations

1. *Preaward Survey Information*¹²⁵

Preaward surveys are a tool for use by contracting officers to make informed responsibility decisions.¹²⁶ Preaward surveys are different from contractor performance assessment reports¹²⁷ as they are objective in nature and completed preaward, while contractor performance assessment reports are generally subjective and are accomplished postaward. The following is a guide to the basics of preaward surveys and the disclosure issues they can generate.

WHAT IS A PREAWARD SURVEY? A preaward survey is "an evaluation by a surveying activity of a prospective

¹²⁵See generally, Cibinic and Nash, *Formation of Government Contracts* (2d ed. 1986) at 239 - 40 and 246 and Ruberry and Arnavas, *Government Contracts Guidebook* (1st ed. 1986) at 3-28.

¹²⁶See generally, FAR 9.101, FAR 9.105-1(b)(1), and FAR 9.106-1(a).

¹²⁷See discussion beginning on page 73 *infra*.

contractor's capability to perform a proposed contract."¹²⁸ Preaward surveys look into such matters as technical capability, production capability, quality assurance capability, financial capability, accounting systems, Government property control procedures, transportation, packaging, security, plant safety, ability to meet the delivery schedule, and past performance.¹²⁹

WHO IS INVOLVED? There are three relevant "who's" here: (1) who requests the information and needs it in order to make a determination; (2) who the subject of the information gathering is; and (3) who does the gathering of information.

(1) Prior to making a responsibility determination, a contracting officer must have sufficient information to ensure that a prospective contractor can meet the responsibility criteria as set forth in FAR 9.104.¹³⁰ The decision to conduct a preaward survey is within the discretion of the

¹²⁸FAR 9.101. This section further defines a "surveying activity" as "the cognizant contract administration office or, if there is no such office, another organization designated by the agency to conduct preaward surveys." Typically, this is the DCAA.

¹²⁹See Accurate Industries, B-232962, 89-1 CPD ¶ 56 (1989); Colt Industries, Inc., B-231213.2, 89-1 CPD ¶ 49 (1989); Delaware Luggage Co. d/b/a Casecraft, Inc., B-231653, 88-2 CPD ¶ 234 (1988); and Oertzen & Co. GmbH, B-228537, 88-1 CPD ¶ 158 (1988).

¹³⁰FAR 9.105-1(a).

contracting officer.¹³¹ In addition, the agency is not required to conduct a preaward survey when the information available to it is sufficient to allow the contracting officer to make an affirmative responsibility determination.¹³²

(2) Information on prospective contractors is usually limited to either the low bidder or those offerors having a high probability of award.¹³³

(3) The survey can be accomplished by the contracting officer's own administration office in which case that office will provide the contracting officer with information on the prospective contractor's financial competence and credit needs, or, in the case where the surveying activity is not involved in contract administration, the information will be obtained from the Defense Contract Audit Agency (DCAA).¹³⁴ In either case auditors are charged with providing the contracting officer information concerning "the adequacy of [the prospective contractors] accounting systems, and these

¹³¹Charl Industries, Inc.--Request for Reconsideration, B-236928.2, 90-1 CPD ¶ 155 (1990).

¹³²MDT Corporation, B-236903, 90-1 CPD ¶ 81 (1990). See also CVD Equipment Corporation, B-237637, 90-1 CPD ¶ 259 (1990); Automated Data Management, Inc., B-234549, 89-1 CPD ¶ 229 (1989); Automated Datatron, Inc., B-232048, 88-2 CPD ¶ 481 (1988); and Enterprise Corp.--Request for Reconsideration, B-225385.2, 87-2 CPD ¶ 75 (1987).

¹³³FAR 9.105-1(b)(1).

¹³⁴FAR 9.105-1(b)(2)(ii).

systems' suitability for use in administering the proposed type of contract."¹³⁵

WHEN IS A SURVEY REQUIRED? The contracting officer "shall" gather information on the responsibility of prospective contractors (to include preaward survey information) "promptly" after the opening of bids or the receipt of offers.¹³⁶ In the world of negotiated contracts, however, the contracting officer can request such information even before the request for proposals is released (commonly done in research and development contracts).¹³⁷ A preaward survey is required when the contracting officer has insufficient information to make a determination of responsibility, but should not be accomplished if the proposed contract will be for \$25,000 or less or will have a fixed price of less than \$100,000 and is for a commercially available product, unless circumstances justify the cost of the preaward survey.¹³⁸ A preaward survey is not a legal prerequisite to a determination of responsibility.¹³⁹

¹³⁵*Id.*

¹³⁶FAR 9.105-1(b)(1).

¹³⁷*Id.*

¹³⁸FAR 9.106-1(a).

¹³⁹*Hoteli Donuts & Pastries*, B-227306, 87-2 CPD ¶ 275 (1987).

WHERE IS THE INFORMATION OBTAINED? The FAR lists the following resources available from which a contracting officer can obtain information to make a responsibility determination:¹⁴⁰ (1) the list of Parties Excluded from Procurement Programs;¹⁴¹ (2) records and experience data; (3) the prospective contractor; (4) preaward survey reports; (5) any other relevant sources; and (6) performance evaluation reports (for construction contracts).

WHY ARE SURVEYS NEEDED?: The basic policy of the FAR with regard to contractor qualifications states that "[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only" and that award shall not be made "unless the contracting officer makes an affirmative determination of responsibility."¹⁴²

The importance of a responsibility determination cannot be understated. It is a decision that can have the most devastating effect on a contractor short of debarment or suspension -- nonaward of the contract. Due to the drastic consequences of a nonresponsibility determination and the ability of contracting officers to base their determination on

¹⁴⁰FAR 9.105-1(c).

¹⁴¹See FAR 9.4.

¹⁴²FAR 9.103(a) and (b). Responsibility determinations can be made at any time prior to award. Gardner Zemke Company, B-238334, 90-1 CPD ¶ 372 (1990).

a variety of information from a variety of sources, the FAR has included specific guidance on the disclosure of preaward information:

(a) Except as provided in Subpart 24.2, Freedom of Information Act, information (including the preaward survey report) accumulated for purposes of determining the responsibility of a prospective contractor shall not be released or disclosed outside the Government.

(b) The contracting officer may discuss preaward survey information with the prospective contractor before determining responsibility. After award, the contracting officer or, if it is appropriate, the head of the surveying activity or a designee may discuss the findings of the preaward survey with the company surveyed.

(c) Preaward survey information may contain proprietary and/or source selection information and should be marked with the appropriate legend and protected accordingly.¹⁴³

Contracting officers are vested with a wide degree of discretion and business judgment in making responsibility determinations and such decisions will not be overturned unless the protester shows bad faith or the lack of a reasonable basis for the decision.¹⁴⁴ This area is ripe for litigation, but with some fine tuning of the relevant FAR provisions, challenges to nonresponsibility determinations

¹⁴³FAR 9.105-3 (emphasis added).

¹⁴⁴See *MCI Constructors, Inc.*, B-240655, 90-2 CPD ¶ 431 (1990); *CVD Equipment Corp.*, supra note 132; *Theodor Arndt GmbH & Co.*, B-237180, 90-1 CPD ¶ 64 (1990); and *Oertzen & Co. GmbH*, supra note 129.

based on preaward surveys can be avoided. When required, the FAR dictates that a preaward survey be accomplished promptly after the opening of bids;¹⁴⁵ however, the FAR does not require (it uses the term "may") the contracting officer to disclose the survey results.¹⁴⁶ For example, if a contractor is the low bidder on an invitation for bids and the preaward survey information is not favorable to the extent that the contracting officer believes a nonresponsibility determination is in order, the contracting officer is free to make that determination, and award to the next higher bidder. The result? An increased procurement cost. As a practical matter, contracting officers should rarely make such a decision without complying with the discretionary disclosure requirement -- however, this does not happen all the time. Contracting officers owe it to their position, and to the public fisc to take whatever steps are necessary to ensure that the agency gets the best deal -- which includes both the lowest price and a responsible contractor. Mandating that contracting officers disclose preaward survey deficiencies is not that onerous a request. The vast majority of cases will be a matter of simply confirming the known. In other cases, the Government may have data that is out of date¹⁴⁷, or in

¹⁴⁵FAR 9.105-1(b)(1).

¹⁴⁶FAR 9.105-3(b).

¹⁴⁷"Information ... shall be obtained or updated on as current a basis as is feasible up to the date of award." FAR 9.105-1(b)(3). In SPM Manufacturer's Corp., B-228078.2, 88-1

flat error, both of which could be corrected in short order by the contractor, but only if the information is disclosed and their input solicited.¹⁴⁸

A recent case illustrates this point. In *International Paint*,¹⁴⁹ as a result of a preaward survey and another report on the status of the contractor's current contract, the contracting officer found the contractor to be nonresponsible. The GAO reiterated the oft-cited rule that "the burden is on the contractor to demonstrate affirmatively that it is responsible."¹⁵⁰ This puts the contractor in the precarious position of not knowing what negative ammunition the contracting officer has concerning its responsibility (since

CPD ¶ 370 (1988) the GAO held that where preaward survey information was five months old and contained a number of deficiencies, the agency should reevaluate its nonresponsibility determination.

¹⁴⁸Contractors should not be allowed the full procedural due process rights that attach when, for example, a nonresponsibility determination is based on the contractor's integrity. See generally the discussion below at page 62. It is clear that a protester's right to procedural due process does not require advance disclosure of preaward survey results or an opportunity for the contractor to defend its position where the information is used to find the protester not responsible for a single procurement [Technical Ordnance, Inc., B-236873, 90-1 CPD ¶ 73 (1990)]; however, due process rights will attach if there is an indication of de facto debarment or suspension. *Omni Analysis; Department of the Navy--Requests for Reconsideration*, B-23372.2 & B-23372.3, 89-2 CPD ¶ 73 (1989).

¹⁴⁹*International Paint USA, Inc.*, B-240180, 90-2 CPD ¶ 349 (1990).

¹⁵⁰*Id.* citing *Becker and Schwindenhammer GmbH*, B-225396, 87-1 CPD ¶ 235 (1987).

the duty to disclose is discretionary), yet bearing the burden of affirmatively proving its responsibility.¹⁵¹ In this case the contractor protested that the agency relied on "inaccurate information and conclusions in the pre-award survey,"¹⁵² and the contracting officer contended that "*the contractor failed to convince the contracting officer that proper corrective measures had been taken to prevent repetition of those problems on this procurement.*"¹⁵³ Although the GAO found that the contracting officer correctly determined the contractor to be nonresponsible, the smarter approach for any contracting officer when confronted with the possibility of making a nonresponsibility determination would be to offer and allow the contractor an opportunity to address the issues. After all, assuming reducing down the number of protests is a goal of the Government, disclosing this type of information at the outset may not foreclose every possibility of a protest, but it certainly would be a significant step in the right

¹⁵¹See MCI Constructors, B-240655, 90-2 CPD ¶ 431 (1990), where the GAO stated that a contracting officer can still consider default terminations over two years old when making a responsibility determination. The key is whether the contractor possesses the current ability to perform.

¹⁵²See *supra* note 149. For another case where a protest was sustained because the Government relied on erroneous data in a preaward survey, see Fairchild Communications & Electronics Company, B-223917, 86-2 CPD ¶ 633 (1986).

¹⁵³*International Paint* seems to extend the affirmative duty to demonstrate responsibility so far as to require the contractor to disclose any and all possible prior performance problems and fully explain why and how those problems will not be repeated.

direction.¹⁵⁴

On the other hand, consider the case of *Ingenieria Y Construcciones Omega S.A.*¹⁵⁵ There, following an award recommendation by the preaward survey, the contracting officer made a "direct request to the firm for information showing that it had the technical capability to perform and that it met the other responsibility standards set forth in [FAR 9.104-1]."¹⁵⁶ The contractor responded with what it considered to be the necessary financial, subcontracting, licensing and other data which the contracting officer determined to be insufficient to support a finding of responsibility and awarded to the next low bidder. This case illustrates a number of things. First, it is an excellent example of a contracting officer who, in the face of an award recommendation by the preaward survey, made written inquiries to a contractor before making a responsibility determination, giving the contractor an opportunity to justify its performance capability. Second, it gives one an idea of what,

¹⁵⁴In a conversation on June 12, 1990, Mr Edmund Miarecki, DLA-G, Defense Logistics Agency (DLA) Office of the General Counsel, indicated that there is no set policy in DLA on the release of preaward survey information. He sees no reason why these reports are not available to the subject of the survey (absent any accompanying recommendations) prior to award. On the other hand, he indicated that the information should be released postaward only pursuant to requests under the Freedom of Information Act (5 U.S.C. § 552).

¹⁵⁵B-241043, 90-2 CPD ¶ 524 (1990).

¹⁵⁶*Id.*

as a minimum, should be required when requesting information from a contractor in order to make a responsibility determination. Here, as noted, the contracting officer went out with a very broad request -- in essence asking the contractor to show why it is responsible. Should the Government have disclosed its specific areas of concern? It surely would never hurt to direct a contractor's attention to the matters of import. Third, and lastly, bear in mind that no matter what a contracting officer does, it cannot foreclose a contractor from protesting; however, as in this case, if the contracting officer discloses to a contractor that the agency is having a problem with the firm's responsibility, the contractor is on notice and there is no question that the contractor must affirmatively justify its responsibility. As the GAO put it, "[a]lthough the Commission did not specify precisely what types of information it required to determine [the contractor's] technical capability to perform [the] contract, its request for technical capability information was sufficient to permit [the contractor] to respond with relevant information."¹⁵⁷ The contractor argued that the contracting officer should have specifically discussed those deficient areas with it prior to rejection; however, the GAO refused to go that far.¹⁵⁸ No doubt, the ability of a contracting

¹⁵⁷*Id.*

¹⁵⁸*Id.* citing *Theodor Arndt GmbH & Co.*, *supra* note 144. Note that if a contractor is deemed nonresponsible based on a preaward survey recommendation, the contractor can offer new

officer to submit a written request as used here and to follow it up with preaward discussions of responsibility will oftentimes be a function of the time constraints for the particular procurement.¹⁵⁹ The question really is where you can best afford the time.¹⁶⁰ If time is taken preaward it may go far in averting later litigation or at least foreclosing the possibility that a protester will prevail on the issue. The bottom line: If the interest is protest avoidance, full disclosure of deficiencies at this stage is advisable.

The GAO has gone so far in limited circumstances to impose on the Government this duty to inquire of the contractor in the

information which may be considered by the agency (time permitting), but such evidence must be fairly scrutinized to see if it refutes the earlier negative indications on which the nonresponsibility determination was made. Eagle Bob Tail Tractors, Inc., B-232346.2, 89-1 CPD ¶ 5 (1989).

¹⁵⁹In Creative Systems Electronics, Inc., B-235388.2, 89-2 CPD ¶ 175 (1989), as part of a responsibility determination, the agency requested supplier and banking information from a prospective contractor which failed to provide it by the deadline imposed by the agency. In upholding the nonresponsibility determination, the GAO held that one week was sufficient time to allow the contractor to assemble this information and present it to the agency. Whether a contractor has sufficient time to provide information must be fact specific. Contractors should normally be able to respond to certain requests for information in less than one week. Again, all this depends upon how much time the contracting officer has to get the procurement off the ground and to a lesser degree the difference in price between the lowest and next low bidder/offeror.

¹⁶⁰The GAO has sanctioned premature preaward surveys as a means of reducing the amount of time required to award a contract. Pyrotechnics Industries, Inc., B-221886, 86-1 CPD ¶ 505 (1986) and T. Warehouse Corporation, B-217111, 85-1 CPD ¶ 731 (1985).

preaward survey stage.¹⁶¹ In *Data Preparation* it was held that the survey report findings were not supported where (1) the nonresponsibility determination was based in part on the prospective contractor's failure to provide equipment and facilities information in its proposal; (2) there was no direct request for information from the agency; and (3) the contractor had the information readily at hand.¹⁶²

In the final analysis, the critical factor here is the discretion of the contracting officer.¹⁶³ There is a tension between the contracting officer's discretion to rely (or not rely) on the results of a preaward survey in making a responsibility determination where the determination may be

¹⁶¹*Data Preparation, Inc.*, B-233569, 89-1 CPD ¶ 300 (1989). See also *SPM Manufacturing Corp.*, B-228078.2, 88-1 CPD ¶ 370 (1988) and *Dyneteria, Inc.*, B-211525, 83-2 CPD ¶ 654 (1983).

¹⁶²*Supra* note 161.

¹⁶³The discretion of the contracting officer and other procurement officials is at the heart of many Government disclosure issues. Unfortunately, that discretion is not always exercised properly. See *Fastrax, Inc.*, B-232251.3, 89-1 CPD ¶ 132 (1989), where the contracting officer, having determined the contractor to be nonresponsible, referred the determination to the Small Business Administration. The GAO held that "there is no requirement that a contracting agency submit information in its possession tending to show that a firm is responsible, since the burden is on the firm to prove through its COC [Certificate of Competency] application that it is responsible. *R.S. Data Systems*, 65 Comp. Gen. 74 (1985), 85-2 CPD ¶ 588, *aff'd* 65 Comp. Gen. 132 (1985), 85-2 CPD ¶ 687."

unreasonable if it is not based on accurate information,¹⁶⁴ and the contracting officer's discretion to base a determination of nonresponsibility upon the evidence in the record without affording an offeror the opportunity to explain or otherwise defend against the evidence since there is no requirement that an offeror be advised of the determination in advance of the award.¹⁶⁵ Put simply, how can a contracting officer insure accuracy of the data without discussing deficiencies with the prospective awardee? Nonetheless, the GAO continues to endorse the broad discretion of the contracting officer. In *American Systems Corporation*,¹⁶⁶ the preaward survey team recommended American not be awarded the contract as it lacked the technical and production capabilities to perform. Specifically the team found American was deficient in the following areas: (1) the number of qualified technicians; (2) inadequate arrangements for parts and service; (3) inadequate testing plans and equipment; (4) inadequate purchasing methods; and (5) failure to understand stock procedures.¹⁶⁷ The GAO upheld the nonresponsibility determination despite the facts that (1) the preaward survey

¹⁶⁴See *BMY, Division of Harsco Corporation*, B-233081 & B-233081.2, 89-1 CPD ¶ 67 (1989), citing *Fairchild Communications & Electronics Co.*, B-223917, 86-2 CPD ¶ 633 (1986).

¹⁶⁵See *BMY, Division of Harsco Corporation*, *supra* note 164, citing *Oertzen & Co. GmbH*, *supra* note 129.

¹⁶⁶B-234449, 89-1 CPD ¶ 537 (1989).

¹⁶⁷*Id.*

team spent only three hours¹⁶⁸ on its investigation; (2) the team refused to permit the contractor to give a full overview presentation of its corporate capabilities; and (3) the team deviated substantially from its published agenda.¹⁶⁹ This is a solid example of a situation where the contracting officer may be on solid legal ground for making a nonresponsibility determination, but should have refrained from doing so without at least adhering to the agenda planned for the team visit. Contracting officers acting with this type of disregard can expect to draw a protest every time.

Contracting officers also have the authority to mandate a second preaward survey or review a nonresponsibility determination if (1) there is ample time, and (2) there is "a material change in a principal factor on which the determination is based."¹⁷⁰ Again, how is the contracting officer going to know if there is such a material change absent full disclosure to and interaction with the prospective contractor?

Another situation where disclosure of preaward survey

¹⁶⁸*Cf. Oertzen & Co. GmbH, supra* note 129 where the survey lasted 90 minutes.

¹⁶⁹*Id.*

¹⁷⁰*Camel Manufacturing Company -- A Request for Reconsideration, B-218473.4, 85-2 CPD ¶ 327 (1985). See also C.F.R. Services, Inc., et. al., 84-2 CPD ¶ 459 (1984) and cases cited therein.*

information can keep a contracting officer out of trouble concerns affiliates.¹⁷¹ Not long ago the Army made a nonresponsibility determination on one contractor based entirely on negative reports of another contractor.¹⁷² The preaward survey stated that the prospective contractor's past performance record was unsatisfactory and then for evidence provided documentation of prior inefficiencies on a *different* contractor. The Army made two losing arguments. First, it contended that regardless of the accuracy of the preaward survey report the contracting officer was entitled to rely upon it, and second, that reliance on the report was reasonable because the two contractors were affiliated by virtue of common management. Had the contracting officer, prior to making a nonresponsibility determination, contacted the prospective contractor, this protest could have been avoided.

2. Disclosure and De Facto Debarments and Suspensions

Rare are the issues in the field of federal procurement that reach constitutional dimensions. This is one. In keeping with the theme of this paper, it is necessary to examine this

¹⁷¹See FAR 19.101 for a definition of "affiliates."

¹⁷²Decker and Company; Baurenovierungsgesellschaft, m.b.H., B-22087; B-220808; B-220809; B-220813; and B-220817, 86-1 CPD ¶ 100 (1986).

issue from the viewpoint of the Government's duty to disclose. As a matter of semantics, this duty can be viewed as the equivalent of providing notice, which, in turn, is an inexorable part of constitutional due process.¹⁷³ On the one hand, the Comptroller General has held that "except in cases amounting to debarment or suspension, a party's right to procedural due process does not require the advance disclosure of pre-award survey results or an opportunity for the contractor to defend its position, because a contracting officer's procurement responsibility determination is in the nature of an administrative decision and not a judicial one."¹⁷⁴ On the other hand, it is clear that the Government must provide due process in cases of formal debarment and

¹⁷³Due process is not a static concept; rather, it is flexible and requires procedural protections indicated by the circumstances. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Consequently, whether agency procedures meet the constitutional requirements for due process varies based on the Governmental and private interests concerned. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Cf., *Conset Corp. v. Community Services Administration*, 655 F.2d 1291 (D.C. Cir. 1981) (some type of hearing and notice are required to meet constitutional due process requirements).

¹⁷⁴*Technical Ordnance, Inc.*, B-236873, 90-1 CPD ¶ 51 (1990), request for reconsideration denied, B-236872.3, 90-1 CPD ¶ 361 (1990). In that case the GAO concluded that since the nonresponsibility determination was based on the contractor's unsatisfactory ratings in the area of technical ability, production capacity, quality assurance, plant security and manufacturing safety and since the protest concerned only a single procurement without indication of debarment or suspension, there was no violation of the contractor's due process rights.

suspension;¹⁷⁵ however, the issue here is the amount of due process required in those instances when no formal debarment or suspension procedures have been initiated, yet a nonresponsibility determination has been made on the basis of integrity. The seminal case in this area is *Old Dominion Dairy Products, Inc v. Secretary of Defense*.¹⁷⁶ This case involved a dairy products supplier, Old Dominion Dairy Products, Inc. (ODDPI), that directed almost 100 percent of its operations at obtaining Government contracts to supply milk products to overseas U.S. military bases. As a result of a contract awarded to ODDPI in 1974 for which it claimed to be in a "loss position," a Defense Contract Audit Agency (DCAA) audit was initiated which concluded there were "irregularities [that] indicate[d] an unsatisfactory record of integrity."¹⁷⁷ Subsequently, ODDPI bid on an \$8.7 million contract in Okinawa for which it was determined to be the low responsive bidder and would have received the award but for the fact that it was determined to be nonresponsible based upon the findings of the audit report. Almost simultaneously, ODDPI lost a \$1.2

¹⁷⁵See FAR 9.406-3(b) (debarment) and 9.407-3(b) (suspension). See also *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964) (formal debarment) and *Horne Brothers, Inc. v. Laird*, 463 F.2d 1268 (D.C. Cir. 1972) (formal suspension).

¹⁷⁶631 F.2d 953 (1980), hereinafter referred to as "*Old Dominion*."

¹⁷⁷*Id.* at 956-957. As to the validity of these "irregularities" the court noted that "it appear[ed] that the foundation of [the audit] report was that Old Dominion had advantageously used a poorly drawn or ambiguous contract." *Id.* at n. 6.

million contract in Yokohama for the same reason. Old Dominion filed suit in United States District Court for the District of Columbia alleging the Government had denied it due process of law. That court "summarily concluded that ODDPI's due process claim was 'without merit.'"¹⁷⁸ In reversing the District Court, the Circuit Court emphasized the fact that "[n]o notice of any kind was ever given to Old Dominion that its responsibility was even in issue."¹⁷⁹ The court considered the Governmental interests of conducting business "effectively and efficiently" and of avoiding the "crippling effect" of imposing strict due process requirements for all unsuccessful contractors and held that

This requirement to give notice will impose absolutely no burden on the Government. Since a determination that a contractor lacks integrity may not be made without reference to specific charges or allegations, it will impose no burden on the Government to notify the contractor of those charges. In so doing, the contractor will at least have the opportunity to explain its actions before adverse action is taken. In this way, a simple misunderstanding or mistake may be clarified before significant injury is done to both the Government

¹⁷⁸*Id.* at 959. The lower court opinion is *Old Dominion Dairy Products, Inc. v. Harold Brown*, 471 F.Supp. 300 (1979).

¹⁷⁹*Id.* (footnote omitted). The omitted footnote refers to the fact that there was no evidence in the record indicating ODDPI had been informed of the results of the audit. *Id.* at n. 14. It is doubtful whether Old Dominion would have prevailed in this case had the audit report been disclosed. In fact, had the Government provided ODDPI with a copy of the report, in all likelihood, the "irregularities" could have been resolved to the satisfaction of both parties, resulting in the award of the contracts to Old Dominion and substantial savings to the Government of nearly \$1.5 million!

and the contractor.

We do not suggest that the Government was required to afford the contractor any type of formal hearing.¹⁸⁰

Old Dominion stands for two propositions. First (and foremost) that an ounce of disclosure can be worth a pound of litigation. Second, that a prospective Government contractor has a right to receive notice of any allegations regarding its integrity prior to denying it more than one contract. One would think that the holding in this case would have found its way into the FAR by now.¹⁸¹ It has not. To date, only the General Services Administration requires its contracting officers to notify prospective contractors by letter of the basis for a nonresponsibility determination so as to "provide the offeror with the opportunity to cure the factors that lead [sic] to the nonresponsibility determination prior to the

¹⁸⁰*Id.* at 968 (footnotes omitted, emphasis in original). Specifically, in this case, the court seems to indicate that notice would have been sufficient had the Government provided ODDPI with the reasons for the nonresponsibility determination on the Okinawa contract at the same time it was provided to the contracting officer considering the Yokohama contract. With regard to the avoidance of injury to both parties, see *supra* note 179.

¹⁸¹Indeed, Professor Nash has advocated this on more than one occasion. See Nash, *Integrity Based Nonresponsibility Determinations: Why Keep the CO in the Dark?*, 1 N & CR ¶ 45 (June 1987). Professor Nash's point is well taken that contracting officers need to be made aware, via regulation, of the outcome of *Old Dominion*. See also, *Postscript: The Due Process Requirement in Responsibility Determinations*, 4 N & CR ¶ 7 (January 1990).

submission of offers in response to future solicitations.¹⁸² Even so, this regulation does not allow for the correction of a wrongful nonresponsibility determination for the present procurement. A contractor's only recourse would be litigation, a step rendered unnecessary by the preaward disclosure of derogatory responsibility information.¹⁸³

What was at least implicit in *Old Dominion* was made clear in a recent GAO decision.¹⁸⁴ The Comptroller General in *Energy Management Corp.* held that *Old Dominion* and its progeny¹⁸⁵ applied to integrity nonresponsibility determinations that involved more than one contract resulting in a nonresponsibility determination. In this case the Army Corps of Engineers found Energy Management Corporation (EMC) nonresponsible based on a preaward survey which indicated the president of the company was under investigation for theft,

¹⁸²GSAR 509.105-3, Disclosure of Preaward Information (emphasis added).

¹⁸³As mentioned earlier, the FAR puts the burden of persuasion on the contractor to establish its responsibility - including establishment of an acceptable record of integrity. FAR 9.103(b) and 9.104-1(d). It is ludicrous to require prospective contractors to "defend" their business integrity when, due to the nondisclosure of preaward survey information and the like, the contractor has no idea that its responsibility is at issue.

¹⁸⁴*Energy Management Corp.*, B-234727, 89-2 CPD ¶ 38 (1989).

¹⁸⁵See, e.g., *ATL, Inc. v. United States*, 3 Cl. Ct. 259 (1983) and *Viktorias-Schaefer International Speditionsgesellschaft mbH & Co. v. U.S. Dept of the Army*, 659 F. Supp. 85 (D.D.C. 1987).

product substitution, and fraud on another Government contract. In upholding the contracting officer's nonresponsibility determination, the Comptroller General stated that "[t]he instant protest involves only one procurement, however, and EMC has not argued that it has been deprived of other contracts."¹⁸⁶

While it appears that information supporting a nonresponsibility determination should always be disclosed prior to award, there is at least one instance where this may not be required. An example is *Frank Cain & Sons, Inc.*¹⁸⁷ where the Army found the contractor nonresponsible due to an unsatisfactory record of integrity based on an interim criminal investigation report which it did not release to the

¹⁸⁶*Id.* As to what level of proof would be required of a protester to argue that it has been deprived of other contracts short of actual nonaward has not been determined. Presumably, contractors will have to wait for a second nonresponsibility determination to have standing to assert a de facto debarment/suspension absent stigmatizing talk or a statement that the nonresponsibility determination applied to a future contract. See Nash, 4 N & CR 7, *supra* note 181 analyzing *Conset Corp. v. Community Services Administration*, 655 F.2d 1291 (D.C. Cir. 1981) (stigmatizing effect of an internal memorandum regarding a potential conflict of interest); *Coleman American Moving Services, Inc. v. Weinberger*, 716 F.Supp. 1405 (M.D. Ala. 1989) (indictment not stigmatizing) and *Related Industries, Inc. v. United States*, 2 Cl. Ct. 517 (1983) (de facto debarment where contracting officer stated contractor would receive no future Government contracts). See also *Leslie and Elliott Co. v. Garrett*, B-237190 & B-237192, 90-1 CPD ¶ 100 (1990) *rev'd* 732 F.Supp. 191 (D.D.C. 1990) (statement and conduct of agency can each independently establish de facto debarment).

¹⁸⁷Request for Reconsideration, B-236893.2, 90-1 CPD ¶ 516 (1990).

contractor prior to award. After reaffirming its decision in *Energy Management Corp.*, the Comptroller General asserted that "such [criminal] report information may be used as the basis of a nonresponsibility determination without the conduct of an independent investigation by the contracting officer to substantiate the accuracy of the report."¹⁸⁸ There is no reason in these instances to require a contracting officer to disclose criminal investigative reports to a prospective contractor that is the subject of the investigation where the information in the report has been compiled by an independent criminal investigation separate from the contracting function. This is not a case like *Old Dominion* where the source of the derogatory information was an audit report requested by the contracting center, and where the contract price analyst for the existing contract was detailed to the DCAA audit team to assist with the audit.¹⁸⁹ Nor is it a case where the negative nonresponsibility data came from a preaward survey.¹⁹⁰ However, Professor Cibinic maintains that even criminal investigative information may be releasable preaward¹⁹¹ -- a concept that idealistically should work, provided there is an

¹⁸⁸*Id.*

¹⁸⁹*See supra* note 176 at 956.

¹⁹⁰*See Energy Management Corp.*, *supra* note 184.

¹⁹¹*See Cibinic, Keeping Audit Reports Away From the Auditee: What You Don't Know Can Hurt You*, 4 N & CR ¶ 21 (April 1990).

exception for the unanticipated.¹⁹²

Despite the lack of guidance in the FAR, contracting officers seem to be getting the message that disclosure of these matters is not as painful as they once thought, even when criminal investigation information is disclosed. In *Cubic Corporation v Cheney*¹⁹³ an Air Force contracting officer found Cubic nonresponsible based upon her consideration of two redacted search warrant affidavits intimating that, in conjunction with the subject procurement, a Cubic consultant bribed the then-Assistant Secretary of the Air Force for Tactical Warfare Systems. Cubic alleged a violation of its due process rights. The court inappropriately cited to *Old Dominion* (as there was no evidence or allegation that the nonresponsibility determination here would extend to any other procurements),¹⁹⁴ but nonetheless held that Cubic had been

¹⁹²FAR 9.103 cloaks the contracting officer with the discretion needed to exercise good business judgment in making these determinations. See also *Frank Cain & Sons, Inc.*, *supra* note 187, and *Americana de Comestibles S.A.*, B-210390, 84-1 CPD ¶ 289 (1984) (nonresponsibility determinations are matters to be decided by contracting officers and the GAO will not question such decisions absent a clear showing that it lacked a reasonable basis). That a contracting officer does not inform a prospective contractor of the reason[s] for the nonresponsibility determination prior to award is not a clear showing that the decision lacks a reasonable basis.

¹⁹³35 CCF ¶ 75703 (D.D.C. 1989), *rev'd on other grounds*, 914 F.2d 1501 (D.C. Cir. 1990).

¹⁹⁴*Id.* at 82,896. That there was no de facto debarment or suspension is made even more clear as: (1) the contracting officer stated explicitly in her notification to Cubic that the nonresponsibility determination only applied to the

afforded due process because the contracting officer immediately notified Cubic of the nonresponsibility determination after it was made and the Air Force agreed to delay award pending further investigation. The contracting officer reaffirmed her nonresponsibility determination 17 days later and award was made to the contractor next in line. Certainly, the contracting officer did not have to inform Cubic of the reasons for the nonresponsibility determination prior to award much less allow it 17 days to cure. That she did in no way compromised the procurement or the integrity of the system and the issue was never raised on appeal.

Finally, the question has been asked as to whether the rule in *Old Dominion* might apply to those situations where an offeror is deemed nonresponsible based on reasons other than integrity.¹⁹⁵ Probably not. In one case,¹⁹⁶ a contractor was determined to be nonresponsible for two contemporaneous construction contracts based upon an Army criminal investigative report that found the contractor had improperly substituted materials in an earlier contract.¹⁹⁷ Although the

subject procurement and; (2) Cubic was awarded a like contract at another base just two days after award of this contract. *Id.*

¹⁹⁵See Nash, 4 N & CR ¶ 7, *supra* note 181.

¹⁹⁶Becker and Schwindenhammer, *supra* note 150.

¹⁹⁷The contractor alleged that it was a mistake and that the contractor itself discovered the error and corrected it at no cost to the Government -- the criminal investigation did

contractor protested that the contracting officer based the nonresponsibility determination on the lack of integrity, and thus, should have triggered the right to procedural due process, the record indicated that the nonresponsibility determinations were not based on integrity; rather, they were based on doubts concerning the contractor's ability to implement quality assurance measures, management and past performance.¹⁹⁸ Despite the undercurrents of integrity mentioned in the opinion, the Comptroller General found that there was no *de facto* debarment or suspension. Like *Old Dominion*, this case involved contemporaneous nonresponsibility determinations, but came to the opposite conclusion.¹⁹⁹

3. Preaward Use of Performance Data

The advent of the computer age has brought with it many advances, not the least of which are the capabilities to create, collect, store, retrieve, edit and transfer

not result in the prosecution of the contractor. *Id.*

¹⁹⁸Interestingly enough, this case has been cited subsequently for the proposition that "where nonresponsibility determinations involve practically contemporaneous procurements of construction services, based on current information of a lack of integrity, de facto debarment is not established." *Leslie and Elliott Co., Inc.*, B-237190 & B-237192, 90-1 CPR ¶ 100 (1990) (emphasis added).

¹⁹⁹What probably made the difference was the contracting officer's assertion in an agency report that "any future responsibility determination regarding [the contractor] would be made independently on the basis of information available at that time." *Id.*

information with relative ease. Hand-in-hand with the Government's duty to disclose information is the Government's seemingly insatiable thirst for the accumulation of information which may be subject to disclosure -- the more information it collects the more potential there is not only for negligent or intentional release, but also the more information on hand may encourage more Freedom of Information Act requests. Or so it would seem. The evaluation of past performance data has resulted in the compilation of massive amounts of data that, with regard to the disclosure of this information, is a procurement success story.

By way of background, while one commentator recently distinguished between information that is gathered to make a responsibility determination (i.e., can the contractor be expected to complete the project on time and within budget?) and information that is assembled to evaluate past performance (will the contractor complete the job successfully?),²⁰⁰ the better view is that both types of information are part and parcel of a responsibility determination.²⁰¹ Indeed,

²⁰⁰Femino, "Evaluating Past Performance," *The Army Lawyer* (DA Pamphlet 27-50-196), April 1989 at 25.

²⁰¹Cibinic and Nash, *Formation of Government Contracts*, *supra* note 125 at 203 and 212. See also Femino, *supra* note 200 where the author concedes that information gathered during a preaward survey and pursuant to a past performance evaluation will indeed paint a complete responsibility picture of a contractor, and that the Comptroller General has recognized the use of a responsibility related past performance factor as a technical criterion in the evaluation

contractors must have a solid record of performance to be deemed responsible. The Federal Acquisition Regulation (FAR) leaves no question that, in order to be found responsible, a contractor "must --[h]ave a satisfactory performance record"²⁰² and that

A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. The contracting officer shall consider the number of contracts involved and extent of deficiency of each in making this evaluation.²⁰³

As previously discussed, responsibility determinations turn on a contractor's capabilities to perform and are based on information primarily gathered by way of a preaward survey. In addition, a contracting officer often solicits past performance evaluations from his or her staff. These evaluations advise the contracting officer of the degree of risk (of completion or noncompletion) that can be expected if

of proposals citing BTH Service Industries, Inc., B-224392.2, 86-2 CPD ¶ 384 (1986) and Wickman Spacecraft and Propulsion Co., B-219675, 85-2 CPD ¶ 690 (1985).

²⁰²FAR 9.104-1(c).

²⁰³FAR 9.104-3(c).

that contractor is awarded the contract.²⁰⁴ Although it would be possible to accomplish both a preaward survey and a past performance evaluation simultaneously, this is not done as two different agencies investigate these matters -- the DCAA typically conducts preaward surveys while the procuring agency usually conducts a past performance evaluation.²⁰⁵

In a recent article, Professor Nash comments favorably on use of past performance as an evaluation factor, stating that not only does it tend to balance out the proposal submitted by the offeror, but the biggest benefit is that it "introduces an additional incentive into the contract after award--because the contractor knows that its performance will have a direct impact on its ability to win contracts in the future."²⁰⁶ To be sure, fairness dictates that if the Government discovers a discrepancy between the information it gathers and that submitted by the contractor, the Government owes it to the contractor and to the integrity of the system to allow a contractor to challenge the Government's data. Thus, the contractor performance assessment reporting system was born.

²⁰⁴Id.

²⁰⁵Id.

²⁰⁶Nash, *Evaluation of Risk in Competitive Negotiated Procurements: A Key Element in the Process*, 5 N & CR ¶ 22 (April 1991).

Contractor Performance Assessment Reporting
System (CPARS)

In his article,²⁰⁷ Mr Femino, while acknowledging that past performance evaluations are being conducted, is unaware of current practices when he states that "[t]hose activities that do evaluate past performance rely almost exclusively upon data supplied by the contractor rather than upon independent data otherwise available to the [G]overnment."²⁰⁸ The Air Force's premier research and development component, Air Force Systems Command (AFSC), has utilized past performance effectively since 1988 in the making of awards in source selections.²⁰⁹ To do so, the Air Force created CPARS in order to:

[P]rovide program management input for a command-wide performance data base used in AFSC source selections.... Performance assessments will be used as an aid in awarding contracts to contractors that consistently produce quality products that conform to requirements within contract schedule and cost. The CPAR can be used to effectively communicate contractor strengths and weaknesses to source selection officials. The CPAR will not be used for any purpose other than the one in this paragraph.²¹⁰

²⁰⁷See *supra* note 200.

²⁰⁸*Id.*

²⁰⁹See Air Force Systems Command Regulation 800-54, Contractor Performance Assessment (11 Aug 88) at Appendix B and 30 G.C. ¶ 290 (August 1988). The full text of the regulation can also be found at 53 Fed. Reg. 30253. The Air Force's use of the CPAR system was upheld recently in *Questech, Inc.*, B-236028, 89-2 CPD ¶ 407 (1989).

²¹⁰*Id.* at ¶ 1b.

The real beauty of CPARS is that it has worked and worked well due in large part to industry support of the system -- support which exists because it is fair and gives the contractor not only a copy of the information pertaining to itself,²¹¹ but allows the contractor an input into the database.

Briefly, this is how the system works. A CPAR must be accomplished on all AFSC concept demonstration and validation, full-scale development and full-rate production and deployment effort contracts with a face value of over \$5 million (excluding unexercised options).²¹² For new contracts an initial CPAR is accomplished between 180 and 365 days after award; an intermediate CPAR is completed every year until the contract period expires; and a final CPAR is completed upon termination of the contract or within 6 months after final delivery.²¹³ A preliminary CPAR is drafted by the project manager or engineer responsible for the contract and recorded on an AFSC Form 125²¹⁴ which is marked "For Official Use Only/Source Selection Sensitive."²¹⁵ This preliminary CPAR is then transmitted to the contractor, which is given 30 days to

²¹¹For a discussion of CPARS and the release of CPARS information to competing contractors, see Chapter IV.B. below.

²¹²*Id.* at ¶ 2a.

²¹³*Id.* at ¶ 5b.

²¹⁴See Appendix C.

²¹⁵See Appendix B, ¶ 6a.

provide an optional response limited to a single typewritten page.²¹⁶ Upon receipt of a response, the author of the preliminary assessment may revise his or her comments and the CPAR is finalized and placed into a command-wide database. The completed CPAR is released only to authorized representatives of the contractor that is the subject of the assessment.²¹⁷

The reasons for the success of CPARS are twofold. First, it allows for candid and protected comments by the contractor after a preliminary assessment has been made by the agency. This way the contractor knows what to rebut if rebuttal is necessary. Second, the contractor has full and complete access to the report, although it may not retain a copy. While this requirement may not make much sense, the rationale behind it must be that if the Government released a copy of a contractor's CPAR to the contractor, and the information was later released by the contractor to a third party (unintentionally or leaked through industrial espionage), the Government may be put in the position of proving that it was not responsible for the release. Thus, the present rule protects both the Government and the contractor yet allows the contractor full access to the document at any time.

²¹⁶Id. at ¶ 6b and c.

²¹⁷Id. at ¶ 6d, 6e, 6f and 9b.

The AFSC CPAR system has worked so well that the concept and regulation were adopted by the Air Force Logistics Command (AFLC).²¹⁸ In fact AFLC has found that the system has worked so well that they are expanding the use of the concept and has recently fielded a proposal to create a new vendor rating system (VRS) to:

encourage the use of quality factors in the source selection process for spare and repair parts by centralizing, automating, collecting and sharing contractor performance information and by maximizing the use of existing sources of contractor performance information to improve the quality of DOD spare and repair parts.²¹⁹

Specifically, the VRS uses data compiled throughout AFLC buying activities to analyze a contractor's past quality and delivery performance by federal stock class (FSC). That information is, in turn, evaluated in the selection of contractors.²²⁰ Performance data is then translated into numerical ratings for determining the competitive range.²²¹ A contractor's rating is a measure of that contractor's performance against the requirements of the contract, not

²¹⁸See Air Force Logistics Command Regulation 800-49, Contractor Performance Assessment Reporting System, 15 Dec 89.

²¹⁹55 Fed. Reg. 206 at 42683 Oct 24, 1990 (to be codified at 48 C.F.R. Chapter 53). See Appendix D for a complete text of this proposal. See also 32 G.C. ¶ 328 (Nov. 5, 1990).

²²⁰Id. at ¶ 5317.9102-1(b)

²²¹Id. at ¶ 5317.9103-2 and 3.

against the performance of other contractors.²²² Unlike the CPAR system, the proposed VRS is silent on the release or disclosure of information, although apparently the next revision of the rule will contain provisions for the release of historical performance ratings.²²³ However, although much like the CPAR system in that both are based (at least preliminarily) solely on Government data and contractors will be able to obtain a copy of what the Government contends to be its historical performance statistics, the VRS does not contain a mechanism to allow for contractor input. Even without an express provision for rebuttal of inaccurate data, the Air Force would be remiss in not considering any information a contractor might have regarding its VRS data. Indeed, the VRS provides for mandatory discussions of contractor VRS quality and delivery rates in awards with discussions; however in awards without discussions the contractor is left to trust that the data the Government has gathered and the statistical extrapolations therefrom are accurate and complete.²²⁴

If anything bad can be said about the CPAR system it would be,

²²²Telephone conversation with S. Wiginton, HQ AFLC/PMPL, Wright-Patterson AFB, OH (June 11, 1991).

²²³*Id.*

²²⁴See *supra* note 219 at ¶ 5352.217-9031.

first, that the system is labor intensive.²²⁵ One need only look at the AFSC Form 125 to see that it will take a lot of work to accurately depict the past performance of a contractor, consider contractor comments (if any) and complete the final evaluation. Second, if a system like CPARS will work for AFSC and AFLC it would certainly be appropriate to explore the possibility of implementing the same sort of system on an agency-wide (e.g., Air Force), department-wide (DoD), or Government-wide basis.²²⁶

The bottom line is that this system works effectively. Contractor involvement in the verification of information used by an agency in evaluating past performance is critical in not only insuring the accuracy of the data, but in precluding litigation, not to mention the time that is saved in staffing Freedom of Information Act requests.

4. Other Information

A contracting officer can, in evaluating proposals, consider

²²⁵Conversation with Mr Edward C. Martin, ASD/PKCS, Wright-Patterson AFB, OH (June 11, 1991).

²²⁶*Id.* See also Nash, *Evaluation of Risk in Competitive Procurements*, 5 N & CR ¶ 22 (April 1991) and Nash, *Improving the Procurement Process: Some Good Suggestions*, 3 N & CR ¶ 62 (September 1989).

evidence obtained from sources outside the proposal²²⁷ and need not disclose the information to the contractor or allow the contractor an opportunity for rebuttal. If such information is not credible on its face, the Government once again owes it to the contractor and to the integrity of the system to allow the contractor to challenge the data. Further, if a contractor, as part of a technical evaluation, furnishes references and is aware that they may be contacted by the Government, the contracting agency may consider the responses of the references without disclosing the information or providing the contractor an opportunity for rebuttal.²²⁸

If the Government is concerned with making an informed decision and one that will provide the Government with the best overall deal, these two cases miss the mark. If the Government gathers information on a contractor that is disparaging enough to knock it out of consideration for award, the Government should allow the contractor to comment on the data. This is especially true where the Government obtains data from references provided by a contractor. Surely if the reference provides negative information on the contractor, the information should be verified since few contractors would sell themselves out of an award by providing fatalistic

²²⁷Holmes & Narver, Inc., B-239469.4 & B-239469.5, 91-1 CPD ¶ 51 (1991).

²²⁸Bendix Field Engineering Corp., B-241156, 91-1 CPD ¶ 51 (1991).

references. Only through accurate and complete disclosure on both sides can either party negotiate the best bargain.

B. *Mistakes*

Mistakes is another preaward area where the Government has a duty to disclose or verify.²²⁹ One commentator has written that in the 13 years from 1963 to 1976 there was little movement in the basic principles governing bid mistakes although there had been some changes in the application of those principles.²³⁰ The same has been true in the past 15 years -- through the evolution to the FAR, the principles of mistake identification and verification have remained virtually unchanged.²³¹ In this section, the relevant FAR provisions and recent cases will be examined first, in the area of sealed bidding and second, the Government's duty to disclose mistakes in negotiated procurements will be discussed.

²²⁹See generally, Arnavas and Ganther, *Preventive Preaward Actions*, Briefing Papers 90-9 (August 1990) at 13.

²³⁰Berger, *Mistakes in Bids/Edition II*, Briefing Papers 76-5 (October 1976) at 1.

²³¹Most recently, FAC 88-44 amended FAR 14.406-3 to clarify the obligation of the contracting officer to disclose "any other information, proper for disclosure, that leads the contracting officer to believe that there is a mistake in bid."

1. Mistakes and Sealed Bidding

"The rationale underlying relief for unilateral mistakes is that it would be unfair for the Government to hold a bidder to a bargain when circumstances indicate that the Government should have discerned the mistake and called it to the attention of the offeror."²³² There exists a number of tensions in the mistake identification and verification process. There is tension between the duty-bound obligation of contracting officers to get the lowest price for the Government and the identification of mistakes which could ultimately result in an increased cost to the Government. Complicating this are the contractors' desires to be awarded the contract and the potential for unbalanced bidding²³³ which requires even more contracting officer attention to detect and verify errors. Even further, this area is complicated by the responsibility of the contractor to exercise due care during the preparation of a bid and the irrevocability period for

²³²Cibinic and Nash, *Formation of Government Contracts*, *supra* note 125 at 484.

²³³An unbalanced bid allows the contractor the flexibility to argue either that its bid price is correct as stated or that it made a mistake and should be entitled to correct or withdraw the bid. Welch, *Mistakes in Bids*, Briefing Papers 63-6 (December 1963). However, it is well established that there is nothing improper in a contractor's proposing what may be a below-cost bid in order to obtain a Government contract or in the acceptance by the Government of such a bid after determining that the contractor is responsible. Diesel Systems, Inc., B-237233, 89-2 CPD ¶ 451 (1989) and Maschhoff, Barr & Associates, B-233322, 88-2 CPD ¶ 491 (1988).

bids (usually a period of 60 days after bid opening in which bids cannot be withdrawn). All this combines to present an area that has generated many protests.

The basic rules for IFB mistakes can be found in FAR 14.406. This section imposes upon contracting officers the duty to examine all bids for mistakes after bid opening, and if "the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake".²³⁴ In order to ensure that the bidder has notice of the perceived mistake, the contracting officer is required to advise the bidder of the following

"as appropriate--"

(i) That its bid is so much lower than the other bids or the Government's estimate as to indicate a possibility of error;

(ii) Of important or unusual characteristics of the specifications;

(iii) Of changes in requirements from previous purchases of a similar item; or

(iv) Of any other information, proper for disclosure, that leads the contracting officer to believe there is a mistake in bid.²³⁵

As can be seen, the Government's duty is quite far reaching --

²³⁴FAR 14.406-1.

²³⁵FAR 14.406-3(g)(1).

perhaps too far reaching. When the disclosure requirements here are compared and contrasted with the like requirements for preaward survey information and audit reports,²³⁶ one is left with the impression that there is no one minding the store. This section of the FAR goes a long way in leveling the playing field in this area, case law flattens it more and actual practice by contracting officers tends to tilt it the other way.²³⁷

In one case, the Government relied on a Government estimate that was too low when it evaluated the contractor's bid.²³⁸ The contractor subsequently alleged a bid mistake and the Comptroller General held for the contractor, allowing cancellation on the grounds that had the Government used an accurate estimate, the Government would have been aware of the contractor's mistake and would have requested verification.²³⁹ Decisions like this have a tendency to overly burden the Government, making it responsible for the detection of errors made by a contractor in his bid, when contractors should bear that responsibility for themselves as a consequence of doing business with the Government the same as if they were dealing

²³⁶See discussion of audit reports at Section D *infra*.

²³⁷See *Pamfilis Painting, Inc.*, E-237968, 90-1 CPD ¶ 355 (1990) where three separate bid verification meetings were held with the protester over a three month period.

²³⁸Comp. Gen. B-163355 (Jan. 26, 1968) 12 CCF ¶ 81,617.

²³⁹*Id.*

with a private entity in the private sector.²⁴⁰ In fact, contracting officers are requesting bid verifications even when not required. The following is an example of what can happen at bid opening when contracting officials, intimidated by the mistake rules, are too quick to seek verification:

Upon opening the bids, Ms. Mercer [a contract specialist for the Government] did not consider the 13 percent price differential significant enough to warrant a bid verification. Nor did any other unusual objective factors suggest to her that bid confirmation may be necessary. Ms. Mercer did notice, however, that Mr. Dwight [protester's estimator] of Allsteel appeared uncomfortable with the difference between the two bids. She thereupon requested that Mr. Dwight confirm Allsteel's bid.²⁴¹

The process of verification can be cumbersome and time consuming. In *TLC Financial Group*,²⁴² TLC, the apparent low bidder on a military family housing contract, bid \$500,000 for line item 0001 (68 percent below the Government estimate and

²⁴⁰The private sector is less forgiving. Cf., *Heifetz Metal Crafts, Inc. v. Peter Kiewit Sons' Co.*, 264 F.2d 435 (8th Cir. 1959) where Heifetz, a kitchen subcontractor, offered to do the kitchen work on a hospital project for which Kiewit was the prime at an amount \$52,000 less than Kiewit's next lowest offer (\$151,500). Kiewit accepted the offer and was subsequently awarded the contract. Heifetz then discovered that it had made a mistake in its bid as it had overlooked some subsidiary kitchen installations required by the plans. Heifetz sought rescission arguing that Kiewit should have known of the error. The court held the contract enforceable.

²⁴¹*Richard C. Fadeley, Jr., d/b/a/ Allsteel Products Company, Inc. v. United States*, 15 Cl. Ct. 706 (1988).

²⁴²B-237384, 90-1 CPD ¶ 116 (1990).

64 percent below the next lowest bidder). The contracting officer requested bid verification from TLC and arranged a meeting to review TLC's calculation of its bid price. At the meeting the contracting officer became increasingly aware that TLC did not understand the requirements of the IFB and TLC refused to either admit to a mistake or submit its bid work sheets for review. The contracting officer concluded that TLC's bid was a mistake and that award to TLC would be unreasonable and unfair to the other bidders.²⁴³ The GAO held that where it is reasonably clear that a mistake has been made, a bid cannot be accepted even if the bidder verifies the bid price, denies the existence of a mistake or seeks to waive a mistake, unless it is clear that the bid would remain low (both as submitted and intended).²⁴⁴

More than one bid verification meeting is not unusual.²⁴⁵ In *Pamfilis Painting, Inc.*,²⁴⁶ three bid verification meetings were held over a three month period only to result in the rejection of the low bidder as its interpretation of the IFB

²⁴³*Id.* and FAR 14.406-3(g)(5).

²⁴⁴See *Alaska Mechanical, Inc.*, B-235252, 89-2 CPD ¶ 137 (1989) and *Duro Paper Bag Mfg.*, B-217227, 86-1 CPD ¶ 6 (1986).

²⁴⁵Multiple verifications would probably be unnecessary and the entire verification process would be less burdensome and time consuming if contractors kept adequate, accurate records of how prices and costs were calculated. Arnava and Ganther, *Preventive Preaward Actions*, Briefing Papers, 90-9 (August 1990).

²⁴⁶See *supra* note 237.

was erroneous and acceptance of the bid was determined to be unreasonable and unfair "to the protester and other bidders."²⁴⁷

2. Mistakes and Negotiated Procurements

Mistakes in offers or proposals under the negotiated procurement provisions of FAR Part 15 are normally resolved through the conduct of discussions.²⁴⁸ When award without discussions is contemplated, contracting officers must comply with slightly different procedures.²⁴⁹ Although the FAR bid

²⁴⁷*Id.* That it would be unfair to other protesters is understandable; however, the protester, had it received the award after a series of three bid verification meetings, would hardly be in a position to assert a claim for postaward mistake and would most likely be staring down the barrel of a termination for default-loaded gun.

²⁴⁸FAR 15.610(c)(4).

²⁴⁹FAR 15.607(c). For all practical purposes, mistakes in procurements awarded without discussions are handled like those for sealed bidding pursuant to FAR 14.406. The National Defense Authorization Act for FY 1991, P.L. 101-510, § 802, amending 10 U.S.C. § 2305 (Nov. 5, 1990) deleted the requirement that awards on initial proposals be made to the offeror with the "lowest overall cost" for solicitations issued after 5 March 1991. Contracting officers are now required to provide notice to prospective contractors as to whether they contemplate awarding without discussions. If so, the contracting officer must justify why discussions are needed prior to conducting discussions. The intent of these changes are to induce contractors to submit the lowest priced initial offer as there might not be another chance to change the offer during discussions. These amendments could result in a substantial increase in awards without discussions and will put more emphasis on preaward mistake procedures as discussions will not normally be available for resolution of mistakes (absent abuses of the system). See, Cibinic, *Postscript: Award Without Discussions*, 5 N & CR ¶ 1 (January

mistake procedures were developed primarily for use in sealed bid situations, those same basic procedures have been applied to negotiated procurements, except where there is a conflict with negotiated procurement procedures.²⁵⁰ For example, in sealed bidding, once the bids are opened the identity of all bidders and the amount of all bids becomes public knowledge.²⁵¹ In glaring contrast are negotiated procurements where information about other offeror's prices is not released until after award.²⁵²

The basic FAR guidance on disclosure of mistakes before award in negotiated procurements is found in FAR 15.607. This subpart reflects the procedures for resolving mistakes in award without discussions cases and also provides for the clarification (not "discussions") of "minor informalities or irregularities and apparent clerical mistakes."²⁵³ If discussions are required, the contracting officer is required to advise the offeror of any deficiencies in its proposal²⁵⁴

1991).

²⁵⁰See *supra* note 230.

²⁵¹Such information may give a contractor information to seek relief for a postaward mistake provided it can meet the rigorous requirements of FAR 14.406-4.

²⁵²As opposed to the closing date for the receipt of proposals. See FAR 15.610(d)(3)(iii) and FAR 15.413-1(a).

²⁵³FAR 15.607(a).

²⁵⁴FAR 15.610(c)(2).

and "attempt to resolve any suspected mistakes by calling them to the offeror's attention as specifically as possible without disclosing information concerning other offerors' proposals or the evaluation process."²⁵⁵ In essence, suspected mistakes in negotiated procurements are disclosed and resolved through discussions.

C. Disclosure of Deficiencies During Discussions

Providing negative feedback is a task that is almost uniformly disliked. This is true even more so in the competitive contractual environment of late when contracting officers must inform offerors of deficiencies in their proposals, with large sums of money at stake, and the possibility looming large that award of the contract may go to a competitor. Such feedback, in negotiated procurement parlance, is referred to as the conduct of discussions and is mandated in the vast majority of instances when awards without discussions are not appropriate.²⁵⁶

When discussions are required, the contracting officer is vested with a great deal of discretion -- "the content and

²⁵⁵FAR 15.610(c)(4).

²⁵⁶See FAR 15.610(a) & (b). That award on initial proposals eliminates the need for discussions and obviously cuts off all grounds for protests concerning the adequacy of discussions is perhaps the greatest incentive to awarding without discussions.

extent of the discussions is a matter of the contracting officer's judgment, based on the particular facts of each acquisition,"²⁵⁷ and requires the contracting officer to

- (1) Control all discussions;
- (2) Advise the offeror of deficiencies in its proposal so that the offeror is given an opportunity to satisfy the Government's requirements;
- (3) Attempt to resolve any uncertainties concerning the technical proposal and other terms and conditions of the proposal;
- (4) Resolve any suspected mistakes ... without disclosing information concerning other offerors' proposals or the evaluation process; and
- (5) Provide the offeror a reasonable opportunity to submit any cost or price, technical or other revisions to its proposal that may result from the discussions.²⁵⁸

The rules appear straightforward, but application by contracting officers and interpretation by the Comptroller General indicate otherwise.²⁵⁹

²⁵⁷FAR 15.610(b).

²⁵⁸FAR 15.610(c). FAR 15.610(d) prohibits conduct that could result in technical leveling, technical transfusion and auctions. These areas are discussed in Chapter IV.A. below.

²⁵⁹The following is a sample of some recent Comptroller General decisions in this area. The requirement for discussions is satisfied by advising offerors in the competitive range of deficiencies in their proposals and affording them the opportunity to satisfy Government requirements by submitting a revised proposal. Advanced Systems Technology, Inc.; Engineering and Professional Services, Inc, B-241530, & B-241530.2, 91-1 CPD ¶ 153 (1991). Agencies need not discuss every element of a technically

acceptable proposal that has received less than a maximum score. *Id.* Contracting officers must "lead offerors into the areas of their proposals that require amplification." National Academy of Conciliators, B-241529, 91-1 CPD ¶ 181 (1991). It is not necessary that the agency provide information to the contractors in any specific manner or form as long as it communicates the deficiency. Xerox Corporation, B-241554, 91-1 CPD ¶ 171 (1991). The agency must impart enough information to the contractor to give it a fair and reasonable opportunity to identify and correct deficiencies in its proposal in the context of the procurement. AMTEC, Inc., B-240647, 90-2 CPD ¶ 482 (1990). Discussions are not meaningful if the Government misleads an offeror or conducts prejudicially unequal discussions. Isometrics, Inc., B-239007.3, 90-2 CPD ¶ 353 (1990). Even if the misleading was inadvertent, the agency should reopen discussions with all offerors. *Id.* If the specifications and the RFP instructions are detailed in nature the agency may not be obligated to conduct all-encompassing discussions and point out every evaluated weakness in a proposal. Morrison-Knudsen Company, Inc., B-237800.2, 90-1 CPD ¶ 443 (1990). Decisions finding discussions inadequate: Advanced Systems Technology, *supra* (adequacy of questions challenged); Xerox Corporation, *supra* (contracting officer misled contractor by treating reliability as an issue of warranty -- no impact on contractor); Isometrics, Inc., *supra* (contractor was told its rent had to include cost of specials when agency intended to pay); Jaycor, B-240029.2 *et al.*, 90-2 CPD ¶ 354, (1990) (agency failed to raise evaluator's concern with contractor's proposal to use active duty military personnel); Morrison-Knudsen, *supra* (three areas labeled as deficiencies were not mentioned or even hinted at during discussions); Questech, Inc., B-236028, 89-2 CPD ¶ 407 (1989) (agency failed to disclose downgrading of proposal due to shortcomings in its technical approach -- not prejudicial); Besserman Corporation, B-237727, 90-2 CPD ¶ 191 (1990) (protest sustained where proposal was eliminated from a competitive range of two for deficiencies that were discovered post-BAFO and never discussed); and Microlog Corp., B-237486, 90-2 CPD ¶ (1990) (post-BAFO discussions not conducted with any other offeror in the competitive range). Decisions finding discussions adequate: National Academy of Conciliators, *supra* (defect in technical approach not considered to be a "significant weakness"); AMTEC, *supra* (Army asked three times for additional information on travel costs); InterAmerica Research Associates, Inc., B-237306.2, 90-2 CPD ¶ 293 (1990) (suggested question by evaluator not used; rather, actual question used much less clear but put offeror on notice); A.T. Kearney, B-237731, 90-2 CPD ¶ 305 (1990) (failure to identify two key employees in discussions on personnel availability sustained); and Maytag Aircraft

This subject has been popular of late as evidenced by a number of excellent articles.²⁶⁰ Just what is it that the agency is required to disclose to a prospective contractor during discussions? The FAR states they are to be informed of proposal "deficiencies" so that they have "an opportunity to satisfy the Government's requirements."²⁶¹

Professor Nash's recent interest in this area focused on the distinction between "deficiencies" and "weaknesses."²⁶² From a purely common sense standpoint, it seems clear that a deficiency is something that keeps a proposal from meeting minimum standards (in either one area or overall), and a weakness is something that while acceptable, could be improved upon, but nonetheless does not fall below what is required to "satisfy the Government's requirements." The FAR definitions of "deficiency"²⁶³ and "discussion"²⁶⁴ offer little help, but

Corporation, B-237068.3, 90-1 CPD ¶ 430 (1990) (extensive written and oral discussions adequate).

²⁶⁰See Nash, *Written or Oral Discussions: Is There a Difference Between "Weaknesses" and "Deficiencies,"* 5 N & CR ¶ 35 (June 1991); Schnitzer, *Discussions in Negotiated Procurements*, Briefing Papers 91-4, (March 1991); and Robison, *Remedies for Defects in Competitive Procurements*, a thesis presented to the National Law Center of The George Washington University in partial satisfaction of the requirements for an LL.M. degree in Government Procurement Law (September 1990).

²⁶¹See *supra* note 258.

²⁶²See Nash, *supra* note 260.

²⁶³FAR 15.601.

²⁶⁴*Id.*

read in concert with FAR 15.610(c)(2) indicate that contracting officers must discuss deficiencies which render a proposal inadequate to meet the Government's requirements and the deficiency must involve information essential for a determination of proposal acceptability. Conversely, if the matter does not cause the proposal to fail to meet Government requirements or if it involves information that is not necessary to determine if the proposal is acceptable, then it is a mere weakness.²⁶⁵

Having sorted out the difference between a weakness and a deficiency and having established the duty of the contracting officer to disclose the latter but not the former, there is yet one more layer of confusion to add and that concerns the discretion of the contracting officer. The paragraph preceding the mandate for discussions states that the contracting officer may exercise judgment as to the extent and

²⁶⁵Professor Nash's research (*supra* note 260) indicated that the Comptroller General uses the terms "deficiencies", "weaknesses" and "excesses" interchangeably. As he points out, there are no cases shedding light on a definition of "excesses." His research did demonstrate a dichotomy in Comptroller General decisions. On the one hand there are the "general cases" that use "deficiency" and "weakness" interchangeably. Such cases, he found, are usually decided by looking to see if the contracting officer made a sincere effort to discuss the areas that led to reduced evaluation scores. On the other hand, there are "specific cases" which tend to differentiate between "deficiencies" and "weaknesses" -- the result being almost uniform that if the agency calls it a weakness, it need not be discussed.

content of the discussions,²⁶⁶ presumably even if the issue involves a matter that rises to the level of a deficiency!

In effect, this is purely and simply a contracting officer problem. The contracting officer is in total control and it is his or her discretion and judgment that will either prevent or precipitate a protest.²⁶⁷ Provided leveling, transfusion or auctions are not factors, there is little reason for a contracting officer not to disclose as much information as possible. After all, the FAR does not proscribe the discussion of "weaknesses."²⁶⁸ Professor Nash states that the FAR is void of any distinction between a deficiency and a weakness absent a passing reference to "weaknesses" in FAR

²⁶⁶FAR 15.610(b).

²⁶⁷The reality is that contracting officers are going to make mistakes. See Dowty Maritime Systems, Inc.; Resdel Engineering Division, B-237170 & B-237173 90-1 CPD ¶ 147 (1990). In that case the contracting officer advised the contractor on 25 July that it was in the competitive range and initiated discussions; however, the technical evaluation of Dowty's proposal had not yet been completed and when it was (on Sep. 7th), it was deemed unacceptable. Dowty protested as the reasons for it being found technically unacceptable on 7 September were different from the matters discussed on 25 July. In upholding the agency's decision, the GAO found no prejudice to Dowty. See also, KOR Electronics, Inc., B-238484, 90-2 CPD ¶ 374 (1990). In that case, KOR received Hughes' BAFO request from the agency in addition to its own. KOR was later advised it received the award until Hughes reminded the contracting officer that it had a lower price. The agency then claimed that no award had been made and subsequently awarded to Hughes.

²⁶⁸However, a contracting officer cannot call a "deficiency" a "weakness" in order to avoid discussions. Logistics Systems, Inc., B-196254, 80-1 CPD ¶ 442 (1980).

15.610(d) concerning technical leveling.²⁶⁹ However, a very critical reference to weaknesses appears in the FAR rules on debriefings.²⁷⁰ Those rule require that

(b) Debriefing information shall include the Government's evaluation of the significant weak or deficient factors in the proposal; however, point-by-point comparisons with other offeror's proposals shall not be made. Debriefing shall not reveal the relative merits or technical standing of competitors or the evaluation scoring. Moreover, debriefing shall not reveal any information that is not releasable under the Freedom of Information Act....²⁷¹

One method contracting officers could use to determine whether or not to disclose information would be to look down the road (a very short way) to debriefing.²⁷² Professor Cibinic wrote a piece on debriefings²⁷³ where he rightfully blasted the failure of the FAR to adequately address the proper procedures and the information to be disclosed in the conduct of a debriefing. He states that "[t]he primary purpose of a debriefing ought to be the *explanation* of the source selection

²⁶⁹See Nash, 5 N & CR ¶ 35, *supra* note 260.

²⁷⁰FAR 15.1003, Debriefing of Unsuccessful Offerors.

²⁷¹*Id.* at 15.1003(b) (emphasis added).

²⁷²Debriefings are often how contractors learn of grounds for protest. See A.T. Kearney, *supra* note 259. "It was only after [the agency] ... held a debriefing conference ... that [the contractor] provided specific support of its allegation that the discussions were inadequate...." *Id.*

²⁷³See Cibinic, *supra* note 41.

decision ... demonstrati[ng] that the selection decision complies with the statutes, regulations and solicitation."²⁷⁴ Thus, if a contracting officer would be uncomfortable debriefing the particulars of such matters as they relate to an unsuccessful offeror's proposal, then perhaps that matter should have been disclosed during discussions, whether it is called a deficiency or a weakness.²⁷⁵ Not only would this practice have the effect of making discussions more meaningful and eliminating some grounds for protests, it would also make the debriefing process somewhat less painful as offerors would have had some prior notice as to where their proposal was lacking. Professor Nash hits the mark when he asks, "[a]fter all, if we believe that the competitive process is best served by agencies helping offerors improve their proposals, why not be forthright in disclosing all of the areas where the original proposal has been downgraded?"²⁷⁶

Finally, while there is no requirement to repeatedly request price verification when mistakes are suspected, there is no limit on the amount of contacts where the Government is

²⁷⁴*Id.* (emphasis in original).

²⁷⁵Protesters have a natural tendency to consider a debriefed weakness to be a deficiency and use it as ammunition for a protest. By disclosing even weaknesses during discussions, it eliminates this arrow from their quiver.

²⁷⁶See, Nash, *supra* note 260.

concerned that a offer may be too low.²⁷⁷ In *Byrne Industries, Inc.* just two days prior to the close of offers, "an Army contracting specialist telephoned Byrne and advised the firm that its price was very low and should be reviewed carefully."²⁷⁸ Byrne raised its prices per unit by \$.195 which resulted in award to another contractor. Byrne protested, asserting that the telephone call coerced and misled it into raising its prices when it had confirmed its price on two earlier occasions. The GAO looked carefully at the surrounding circumstances and denied the protest since Byrne's original price was lower than any other price previously paid for the product and an earlier contractor had gone bankrupt producing the items at an even greater cost. *Byrne Industries, Inc.* stands for the proposition that repeated contacts with contractors in the verification process are acceptable provided a mistake is suspected and well illustrates the application of the "damned if you do, damned if you don't" cliché in Government contracting -- the Government walks a fine line between informing contractors of suspected mistakes and communicating too much with prospective contractors.

²⁷⁷*Byrne Industries, B-239200, 90-2 CPD ¶ 122 (1990), citing Pamfilis Painting, Inc., supra note 237.*

²⁷⁸*Id.*

D. Disclosure of Audit Reports

Ostensibly, audit reports should be treated much the same as preaward surveys and generally the information ought to be disclosed. There are not many cases in the area of audit reports and what little case law there is weighs surprisingly heavy in favor of nondisclosure. Indeed, it is a rarity when the United States Supreme Court decides a case that makes inroads into federal procurement law, but it did so recently in this area in a FOIA opinion.²⁷⁹ In *John Doe*, the DCAA conducted an audit²⁸⁰ and took issue with the accounting of \$4.7 million worth of costs. The contractor responded to a letter from the DCAA in 1978 and heard nothing further on the matter until 1985 when the United States Attorney for the Eastern District of New York initiated an investigation into alleged fraudulent practices by the contractor. In 1986, a subpoena was issued to the contractor requiring production of documents relating to the allowability of the costs that were at issue in 1978. Seven months later, the contractor submitted a FOIA request to the DCAA for any documents "that

²⁷⁹*John Doe Agency v. John Doe Corp.*, 110 S. Ct. 471 (1989).

²⁸⁰It is not clear from the opinion if the award was conducted preaward or postaward. This is of no matter as the agency will typically claim exemption under (b)(5) as all audit reports are predecisional -- used either as a basis to award the contract or as a basis to evaluate an equitable adjustment or a claim. If the agency claims exemption under (b)(7) both preaward and postaward audits are exempt.

[were] related in any way to the subject matter" of the earlier correspondence.²⁸¹ Two days after the DCAA denied the request [citing FOIA exemptions (b)(7)(A) & (E)], the documents were transferred to the Federal Bureau of Investigation (FBI) which subsequently denied another FOIA request [citing exemption (b)(7)(A)]. The contractor filed suit in District Court which sustained the agency determination. The Circuit Court reversed²⁸² holding that the records were not exempt from disclosure under exemption (b)(7) as the records were not compiled for law enforcement purposes as the records were compiled seven years before the criminal investigation began. On appeal, the Supreme Court reversed the Circuit Court, holding that the agency did not have to disclose the information.²⁸³ The Court found that "the Government has the burden of proving the existence of such a compilation for such a purpose,"²⁸⁴ and that the words "compiled for law enforcement purposes" does not mean "originally compiled for law enforcement purposes," and that "documents need only to have been compiled when the response

²⁸¹See *supra* note 279 at 473.

²⁸²*John Doe Corporation v. John Doe Agency and John Doe Government Agency*, 850 F.2d 105 (2d Cir. 1988).

²⁸³See *supra* note 279 at 478.

²⁸⁴*Id.* at 475.

to the FOIA request must be made."²⁸⁵ The Court's conclusion that "[t]he statutory provision that records or information must be 'compiled for law enforcement purposes' is not to be construed in a nonfunctional way" led to strong dissents by Justices Stevens, Scalia and Marshall.²⁸⁶

At the same time the United States District Court was deciding a similar case and came to the same conclusion as did the Supreme Court in *John Doe*.²⁸⁷ In *Jowett*, the contractor

²⁸⁵*Id.* at 476. The Court acknowledges that this may raise "a question about the bona fides of the Government's claim that any compilation was not made solely in order to defeat [a] FOIA request." *Id.*

²⁸⁶*Id.* at 478.

²⁸⁷*Jowett, Inc. v. The Department of the Navy*, 729 F.Supp. 871 (D.D.C. 1989). By no means was the district court decision a coincidence -- the court has a solid history of withholding federal procurement information in the face of FOIA requests under similar facts. See *Lasker-Goldman Corp. v. General Services Administration*, 28 CCF ¶ 81,103 (contractor not entitled to a copy of its draft audit report under FOIA as exemption (b)(5) applies -- exemption not waived by unauthorized leak to the press). See also, *Raytheon Company v. The Department of the Navy*, 35 CCF ¶ 75,609 (D.D.C. 1989) where the contractor submitted a FOIA request for *inter alia*, audit reports, working papers analyzing the financial impact of defective cost and pricing on the contracts, and documents summarizing agency positions regarding the audit. *Id.* at 82,301. The court concluded that the materials were exempt under (b)(7) as at the time the records were made, the DCAA had already begun to investigate the contractor. *Id.* at 82,302. The court was not concerned with whether the documents were originally compiled for law enforcement purposes, rather the test is whether, at the time of the FOIA request, the records were part of an investigatory file and release of the information might compromise the investigation. *Id.* The Government successfully argued that

[D]isclosure of the requested documents would enable plaintiff to interfere with the ongoing

submitted a FOIA request for disclosure of audit reports relating to its assertion of a \$698,488 equitable adjustment. The Navy released parts of the audits but redacted substantial portions claiming exemption under (b)(5). The court held that not only were the audit reports predecisional, but would remain nonreleasable unless the agency incorporated the information into a final decision.

investigation by altering or destroying other documents in its file which have not yet been subpoenaed by the government through various tactics, i.e., coaching witnesses based on their knowledge of what the government knows and the general direction of the investigation; devising fraudulent explanations of its actions to cover up any misconduct; and intimidating Raytheon employees who might have given interviews to government agents in order to discourage future cooperation with the government. Furthermore ... release of the documents could indicate the type of enforcement proceeding the government is contemplating (i.e., civil, criminal, or administrative), the nature of the charges it might file, and the government's estimation of its damages, which could be particularly valuable to Raytheon in the event of settlement negotiations.

Id.

See also *Gould, Inc. v. General Services Administration*, 688 F.Supp. 689 (D.D.C. 1988) where at issue was the release pursuant to a FOIA request by the contractor of two postaward audit reports. The court held that the "present inclusion of these audit reports in the investigatory record or file is the result of the natural and legitimate progression of materials underlying a routine audit--after that audit uncovered potential criminal wrongdoing--to a law enforcement file." *Id.* at 703 (footnote omitted).

Raytheon and Gould seemed to give contractors the opportunity to request, pursuant to the Freedom of Information Act, audit reports and receive them provided no investigation had begun. This option was foreclosed by *Jowett* and *John Doe*.

Jowett is of great import for two reasons. First, it comes to the wrong conclusion and second, it addresses a major underlying theme of this paper -- the effect of the disclosure of information on the agency/contractor relationship. Taking the latter first, the court states

*At bottom, Jowett's complaint is that it is not in an equal negotiating position with the Navy contracting officer.... Although Jowett may be at somewhat of a competitive disadvantage in trying to obtain an adjustment of its contract from an entity that has information to which Jowett does not have access, this situation is created not by the FOIA, but by virtue of the particular relationship between a government contractor and the contracting agency as well as the law governing equitable adjustments.*²⁸⁸

Incredibly, the very next sentence of the opinion states: "Jowett's interpretation of Exemption 5 would destroy the delicate balance of the government contractor/contracting agency relationship."²⁸⁹ The court obviously views this "delicate balance" as one not so precariously tipped in favor of the Government and where release of the documents might level the playing field.²⁹⁰

²⁸⁸*Jowett*, *supra* note 287 at 876 (emphasis added).

²⁸⁹*Id.* (emphasis added).

²⁹⁰Agencies do, after all, have great authority to audit. See e.g., Inspector General Act of 1978, 5 U.S.C. App. §§ 1-11; *United States of America v. Newport News Shipbuilding and Drydock Company*, 837 F.2d 162 (4th Cir. 1988) (*Newport News I*); and *United States of America v. Newport News Shipbuilding and Drydock Company*, 862 F.2d 464 (4th Cir. 1988) (*Newport News II*); *DCAA's Access to Records*, A Report by the Special

Turning now to the correctness of the court's decision to withhold the audit report, the court contends that "[f]orcing the Navy to provide Jowett with the auditor's opinions and recommendations, and the criteria used in arriving at questioned costs, before the contracting officer has made a final decision on Jowett's claim for an equitable adjustment would greatly interfere with the contracting officer's decision-making process."²⁹¹ Unfortunately, the court fails to say just exactly how it would interfere. This was a case of making cost allowance determinations -- the allowability of which is set forth with great particularity in the FAR and addressed in countless boards of contract appeals decisions. There was not much room for "deliberation" and the reports should have been released.

Professor Cibinic has also taken the position the decisions in *John Doe* and *Jowett* are "wrong" and "encourage secrecy where frankness and openness are called for."²⁹² It has been his experience that most contractors get a copy of the audit report from the contracting officer so all issues raised by

Committee on Audit Activity and Access to Records of the American Bar Association Section of Public Contract Law (1989); West and Kassel, *Access to Contractor Records/Edition I*, Briefing Papers 88-5 (April 1988); and Schnitzer, *Access to Contractor Records II*, Briefing Papers 79-6 (December 1979).

²⁹¹*Jowett*, *supra* note 287 at 875.

²⁹²See Cibinic, 4 N & CR ¶ 21 *supra* note 191.

the contractor can be considered.²⁹³ He states three reasons why audit reports should be released: (1) giving contractors copies of their audits will not inhibit DCAA auditors from "truth in auditing;" (2) disclosure will facilitate negotiations, a preferable alternative to litigation; and (3) release will have no impact on criminal investigations.²⁹⁴ Professor Cibinic's last point warrants a comment. Although as he puts it "we have never seen the harm in permitting a potential defendant to respond to the charges and construct a defense,"²⁹⁵ that is only part of the issue. As noted above in *Gould, Inc.*²⁹⁶ and *Raytheon Company*²⁹⁷ other considerations exist, such as not inhibiting witnesses from granting interviews as their names may wind up in the report and if the contractor has committed fraud, it is possible that a

²⁹³*Id.*

²⁹⁴*Id.* Professor Cibinic cites to the DCAA Contract Audit Manual, DCAAM 7640.1 (January 1990) and states that the DCAA is typically not a "shrinking violet" about disclosing audit reports and that incurred cost and functional/operational audits are normally distributed directly from the DCAA to the auditee. *Id.* Although the DCAA's policy does in fact lean toward disclosure, the DCAAM states that "reports on incurred cost submissions, functional reviews, and special reports ... will not be furnished to the contractor ... audited ... without specific direction by the cognizant contracting officer DCAAM 7640.1, ¶ 10-206.2 (a) (January 1991) (emphasis added).

²⁹⁵*Id.*

²⁹⁶See *supra* note 287. In this case, the documents contained the names of witnesses, sources of information, and documents provided by these sources.

²⁹⁷*Id.*

contractor might destroy or alter files to cover its criminal tracks.

The FAR provides limited guidance on the contents of preaward audits:

(a)(1) When cost or pricing data are required, contracting officers shall request a field pricing report (which may include an audit review by the cognizant contract audit activity) before negotiating any contract or modification resulting from a proposal in excess of \$500,000, except as otherwise authorized under agency procedures, unless information available to the contracting officer is considered adequate to determine the reasonableness of the proposed cost or price

(2) Field pricing reports are intended to give the contracting officer a detailed analysis of the proposal, for use in contract negotiations

(e) The audit report shall include the following:

(1) The findings on specific areas listed in the contracting officer's request.

(2) An explanation of the basis and method used by the offeror in proposal preparation.

(3) An identification of the original proposal and of all subsequent written formal and other identifiable submissions by which cost or pricing data were either submitted or identified.

(4) A description of cost or pricing data coming to the attention of the auditor that were not submitted but that may have a significant effect on the proposed cost or price.

(5) A list of any cost or pricing data submitted that are not accurate, complete and current and of any cost representations that are unsupported. When the result of deficiencies is so great that the auditor cannot perform an audit or considers the proposal unacceptable as a basis for negotiation, the contracting officer shall be orally notified so that prompt corrective action

may be taken, as provided by FAR 15.805-5(d). The auditor will immediately confirm the notification in writing, explaining the deficiencies and the cost impact on the proposal.

(6) The originals of all technical analyses received by the auditor and a quantification of the dollar effect of the technical analysis findings.

(7) If the auditor believes that the offeror's estimating methods or accounting system are inadequate to support the proposal or to permit satisfactory administration of the contract contemplated, a statement to that effect.

(8) A statement of the extent to which the auditor has discussed discrepancies or mistakes of fact in the proposal with the offeror.

(f) The auditor shall not discuss auditor conclusions or recommendations on the offeror's estimated or projected costs with the offeror unless specifically requested to do so by the contracting officer.

(h) If any information is disclosed after submission of a proposal that may significantly affect the audit findings, the contracting officer shall require the offeror to provide concurrent copies to the appropriate field office²⁹⁸

This FAR provision seems to encourage disclosure and discussion of adverse findings with the offeror, and is consistent with the DCAAM in that audit information is best released through the contracting officer to the contractor. Paragraph (h) even goes so far as to impose on the contractor and the contracting officer a duty to continue disclosure of matters that may impact the audit findings.

²⁹⁸FAR 15.805-5, Field Pricing Support (emphasis added).

As is probably apparent, this is a very muddled area. On the one hand the logic of disclosure has been lost on even the U.S. Supreme Court. With luck, Professor Cibinic's hope that the DCAA will not alter its practice of disclosure may be coming true as there have been no more recent cases on this matter than those cited. On the other hand, if contracting officers want to play hardball, they are free to use the FOIA exemptions to exclude the disclosure of audit reports.

IV. Disclosure of Information Pertaining to Competing Contractors

By design and law the federal procurement system promotes competition. A natural byproduct of this competition is that contractors will do whatever is necessary to gain and maintain the competitive edge in their area of expertise, and the gathering of information is the linchpin to success. As a result, contractors will push the federal procurement system in any way possible to get the information they believe they need. In addition to the Trade Secrets Act,²⁹⁹ the Freedom of Information Act,³⁰⁰ and the Procurement Integrity Act³⁰¹ cases there are a number of instances where the Government is in control of confidential or proprietary information provided by a prospective contractor, that, if compromised, might eliminate or compromise its competitive edge. In this chapter, a few of these areas will be discussed.

A. *Auctions, Technical Transfusion and Technical Leveling*

This is one area that has generated a significant amount of litigation before the Comptroller General, the courts and the

²⁹⁹18 U.S.C. § 1805.

³⁰⁰See 5 U.S.C. § 552 and Cibinic, *Freedom of Information Act: Tool For Industrial Espionage?*, 2 N & CR ¶ 36 (June 1988)

³⁰¹41 U.S.C. § 423(b)(3).

General Services Administration Board of Contract Appeals (GSBCA). The status of the law in this area has been extensively documented of late³⁰² and the discussion here will center on only the most controversial issues and recent cases.

1. Auctions

Examples of auctions include

- (i) Indicating to an offeror a cost or price that it must meet to obtain further consideration;
- (ii) Advising an offeror of its price standing relative to another offeror (however, it is permissible to inform an offeror that its cost or price is considered by the Government to be too high or unrealistic); and
- (iii) Otherwise furnishing information about other offerors' prices.³⁰³

Auctions are prohibited as they "[1] can give price or cost a disparate importance in relation to its assigned weight in the evaluation criteria in the RFP ... [2] dilute competition

³⁰²For an excellent and exhaustive article in this area, see Feldman, *Traversing the Tightrope Between Meaningful Discussions and Improper Practices in Negotiated Federal Acquisitions; Technical Transfusion, Technical Leveling, and Auction Techniques*, 17 Pub. Cont. L.J. 21 (1987). See also Nash, *Technical Leveling: Confusion and Clarification*, 1 N & CR ¶ 2 (January 1987) and Nash, *Postscript: Understanding the Meaning of "Technical Leveling,"* 4 N & CR ¶ 62 (November 1990).

³⁰³FAR 15.610(d)(3) and Space Communications Company, B-223326.2 & B-223326.3, 86-2 CPD ¶ 377 (1986).

because they can deprive the offeror with the lowest price or cost of a legitimate competitive edge in the acquisition ... [and] [3] can lead to a prejudicial inequality of treatment between offerors."³⁰⁴

There is nothing inherently illegal about auctions in negotiated procurements,³⁰⁵ and, under some circumstances, auctions are sanctioned.

[T]he possibility that a contract may not be awarded based on true competition on an equal basis has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction. The statutory requirements for competition take primacy over the regulatory prohibitions of auction techniques.³⁰⁶

While this may be true, the results are often not often appreciated by protesters,³⁰⁷ and the goal of protecting the

³⁰⁴See Feldman, *supra* note 302 at 247.

³⁰⁵Sperry Corporation, B-222317, 86-2 CPD ¶ 48 (1986).

³⁰⁶*Id.*

³⁰⁷See, e.g., Cubic Corporation--Request for Reconsideration, B-228026.2, 88-1 CPD ¶ 174 (1988) where it was determined that the risk of an auction was secondary to the preservation of the competitive procurement system, even where it meant reopening discussions and a new round of BAFOs after a competitor's price had been disclosed. See also, FCC.O&M, Inc., B-236810.2, 91-1 CPD ¶ 26 (1990) -- even in cases where the potential for an auction exists, the GAO has balanced the integrity of the procurement system against the potential harm that may be caused by an auction. FCC.O&M involved a protest by a competitor, Sterling, which protested an ambiguity in a solicitation manning requirement on a solicitation for which FCC.O&M was the low offeror. Having

integrity of the procurement system is noble provided prospective contractors are not driven away from doing business with the Government because of these types of decisions. One recent decision may even require an offeror desiring to continue to participate in the reopening of a procurement to disclose its price.³⁰⁸ The Federal Circuit, while acknowledging such disclosure violated the FAR prohibition on auctions, held that when such a violation is balanced against the Competition in Contracting Act's requirement for full and open competition,³⁰⁹ disclosure is not improper.³¹⁰

Sometimes what could be a very difficult situation is made

determined that the protest was based on legitimate grounds, the agency issued an amendment, rendering the protest moot. Upon withdrawal of Sterling's protest, the contracting officer sent both Sterling and FCC.O&M a letter advising them that the amendment had been issued. Attached to each letter was a copy of the contracting officer's "Statement of Facts and Findings" which listed FCC.O&M and its proposed prices as well as Sterling's. FCC.O&M then protested that any reopening of discussions would be an impermissible auction. The Comptroller General held that "preserving the integrity of the competitive system through reopening discussions clearly takes precedence over the risk of an auction due to disclosure of the offeror's prices." *Id.* citing *Contact Int'l Corp.*, B-237122.2, 90-1 CPD ¶ 481 (1990). The GAO also considered the facts that the revision to the manning requirement and a shortening of the performance period would necessitate price revisions, thereby lessening the impact of the disclosure.

³⁰⁸*NCR Corporation v. United States*, 9 FPD ¶ 131 (Fed. Cir. 1990).

³⁰⁹P.L. 98-369, 98 Stat. 1175 (July 18, 1984).

³¹⁰*NCR Corp.*, *supra* note 308.

easier with the help of the competing contractors. For example, where an awardee's BAFO has been disclosed and the contract is recompeted, the agency may ask other offerors to disclose their BAFO in order to eliminate any unfair advantage.³¹¹ In *Sperry Corp.*, the agency awarded a contract to Sperry, but in the course of preparing for a debriefing with a losing contractor, the agency detected an error, necessitating recompetition. Here, because Sperry's total contract and option prices had been disclosed, the other offerors agreed to disclose theirs. The GAO did not consider this an auction as an auction is the "indicating of one offeror's price to another offeror during negotiations."³¹²

But even when an agency tries to do right, things go wrong. For example in *Honeywell, Inc.*,³¹³ the Navy awarded a contract to Honeywell, and after an agency level protest was sustained, the Navy decided to amend the RFP and reopen the competition. In the meantime, the diligent contracting officer had promptly and properly sent out to all unsuccessful offerors the required notice of award to Honeywell which included Honeywell's price. Having lost the recompeted award, Honeywell protested, alleging an auction. The Comptroller General held that since Honeywell knew the initial award was

³¹¹*Sperry Corporation*, B-222317, 86-2 CPD ¶ 48 (1986).

³¹²*Id.* (emphasis added).

³¹³B-231365.2, 88-2 CPD ¶ 550 (1988).

canceled and that the FAR required the notice be sent to unsuccessful offerors, its protest after a competitor won the award was untimely.³¹⁴

Often regardless of whether information is disclosed or withheld a protest will ensue. As proof that some contractors will take every advantage of the system, consider the case of *ACR Industries, Inc.*³¹⁵ In this case the Comptroller General rightfully denied a protest wherein the protester alleged an improper auction since its second round BAFO was disclosed to a competitor when, in fact, the protester had the first round BAFO of its competitor!

2. Technical Transfusion

Technical transfusion is the "Government disclosure of technical information pertaining to a proposal that results in improvement of a competing proposal."³¹⁶ To establish

³¹⁴The case could have been decided on the principle that revealing the price of an "ongoing" contract does not give rise to an auction -- Bethlehem Steel Corp., Baltimore Marine Division; The American Ship Building Co., Tampa Shipyards, Inc., B-231923 & B-231923.2, 88-2 CPD ¶ 438 (1988) and Pantel Associates, B-230793, 88-1 CPD ¶ 581 (1988) -- or that there was no disclosure during negotiations. *Sperry Corp.*, *supra* note 311.

³¹⁵B-235465, 89-2 CPD ¶ 199 (1989).

³¹⁶FAR 15.610(d)(2) and *Space Communications Company*, *supra* note 303.

transfusion, the contracting officer must have either directly or indirectly disclosed an offeror's technical approach to a competitor.³¹⁷ The bulk of the cases involving disclosure of competitive information to competing contractors results either from inadvertence³¹⁸ or from criminal activity.³¹⁹ If such information is released, the question then becomes whether or not there has been any prejudice. If not, the

³¹⁷Northwest Regional Educational Laboratory, B-222591.3, 87-1 CPD ¶ 74 (1987), citing TEK, J.V. et al., B-221320, 86-1 CPD ¶ 365 (1986).

³¹⁸See Computer Sciences Corp., B-231165, 88-2 CPD ¶ 188 (1988) (support contractor had access to development contractor's engineering change proposals and its labor, overhead, and general and administrative rates as well as other sensitive data. Both contractors were now competing for award of a follow-on support contract. The Comptroller General denied the development contractors' protest as there was no indication the disclosure was due to anything but inadvertence and there was no evidence that the information was used; curiously, however, following an *in camera* review of the protest, the GAO refused to exclude the support contractor as it would have a significant impact on competition).

³¹⁹See, e.g., some recent Ill Wind cases: Compare the result in Litton Systems, Inc., B-234060, 89-1 CPD ¶ 450 (1989) (protest sustained where protester was within a competitive range of two) with Aydin Corp., B-2320003, 88-2 CPD ¶ 517 (1988) and Comptek Research, Inc., B-232017, 88-2 CPD ¶ 518 (protests denied as not within the competitive range and no evidence awardees received any source selection sensitive information). The GAO in *Comptek Research, Inc.* clearly found that the record "indeed contains evidence of possible disclosure of source selection information," but in *Litton Systems, Inc.*, states that in *Comptek Research, Inc.*, and *Aydin Corp.* "there was no evidence that the awardees improperly received any source selection information." There is no way to explain this difference, but the end result can best be pinned on the number of offerors in the competitive range.

protest will be denied.³²⁰ If there has been prejudice, then you need to ask if the integrity of the competitive system outweighs the prejudice to the protester. The Comptroller General places great weight on the integrity of the procurement system, often overriding the concerns of the parties. For example, the GAO has held that despite the fact that a protester's technical formula and prices were revealed to its competitors by the agency in the course of award and the protest process, "the importance of correcting the improper award through further negotiation overrides any possible competitive disadvantage accruing to [the contractor] by the disclosures."³²¹

In another case, the Comptroller General stated that concerns about technical leveling and transfusion do not overcome the need to remedy a procurement that was not fully and openly competed.³²² Following award on initial proposals and a debriefing, the debriefed contractor protested that the awardee's offer was unbalanced, prompting the agency to hold

³²⁰There is no remedy for improper disclosure of confidential information if there is no affirmative showing that the contractor was competitively prejudiced. Management Services, Inc., B-184606, 76-1 CPD ¶ 74 (1976).

³²¹Norden Systems, Inc.; Sperry Marine, Inc.; Department of the Navy--Reconsideration, B-227106.3, B-227106.4, & B-227106.5, 87-2 CPD ¶ 367 (1987) citing Harris Corp., B-204827, 82-1 CPD ¶ 274 (1982).

³²²Pan Am Support Services, Inc.--Request for Reconsideration, B-225964.2, 87-1 CPD ¶ 512 (1987).

discussions. The GAO found that such action was appropriate as there was no evidence that the debriefing included any specifics on the awardee's proposal.

There are times when the Government is caught between two competing contractors. One recent case³²³ offers an interesting example. Two weeks prior to the date set for the receipt of offers, a program director from Compliance Corporation (Compliance) contacted an assistant security manager of a competing contractor [Eagan, McAllister Associates, Inc. (EMA)] for a Navy contract. The Compliance employee sought information concerning a like contract for which EMA was the incumbent, (1) including proprietary salary information, (2) whether some EMA employees might like to work for Compliance if it were to be awarded the contract, and (3) a list of Government-owned property in use by EMA under a current contract. A Naval Investigative Service investigation was initiated that confirmed these facts and even indicated the EMA security specialist was offered a job with Compliance if the information was provided. The investigation revealed that the Compliance employee obtained a written list of the position descriptions of the EMA employees working on the current contract as well as the amount of time they had worked on the contract. When the contracting officer disqualified

³²³Compliance Corporation--Reconsideration, B-239252.3, 90-2 CPD ¶ 435 (1990).

Compliance on the basis of its improper conduct, Compliance protested. The Comptroller General denied the protest on the grounds that Compliance in all likelihood had obtained an unfair competitive advantage.³²⁴ Compliance argued unsuccessfully that such conduct was "nothing different than the aggressive and normal business tactics"³²⁵ used in the private sector on a day-to-day basis and that the end result is a lower procurement cost to the Government. GAO rejected Compliance's assertion that the matter was purely one between two private parties, finding that such conduct goes to the very heart of the integrity of the federal procurement system and that the contracting officers have great discretion to protect the Government's interests.³²⁶

Whether a transfusion argument will succeed may depend on the type of information disclosed. In one case³²⁷ the agency had the incumbent contractor complete a Standard Form (SF) 98 ("Notice of Intention to Make a Service Contract and Response to Notice"), a form normally completed by the agency and submitted to the Department of Labor for wage determinations

³²⁴*Id.* citing Holmes and Narver Servs., Inc./Morrison-Knudson Servs., A Joint Venture; Pan Am World Servs., Inc., B-235906; B-235066.2, 89-2 CPD ¶ 379, *aff'd*, Brown Assocs. Management Servs., Inc.--Recon., B-235906.3, 90-1 CPD ¶ 299.

³²⁵*Id.* (emphasis in original).

³²⁶*Id.* citing FAR 1.602.

³²⁷Vinnell Corporation, B-230919, 88-2 CPD ¶ 4 (1988).

for service contracts. The SF 98 was then appended to the RFP for a follow-on contract for which the incumbent was competing. The incumbent contractor claimed that release of the form (which included the mix of skills used to perform the present contract to such a degree that its proposed price would be compromised) put it at a severe competitive advantage. The GAO disagreed, holding that this was not such a case where the protester was so prejudiced by the disclosure of data which directly revealed the product or service to be rendered, such that the solicitation had to be cancelled or a sole source award be made.³²⁸ Rather, the data here only reflected one contractor's approach to the work to be done.

Additionally, the Government is not required to disclose information to a contractor concerning an incumbent contractor.³²⁹ In *Master Security*, a contractor protested the fact that the agency refused to release personnel information concerning the incumbent contractor's work force which the protester needed to plan his work force if it was awarded the contract. The Comptroller General held the Government has no duty to disclose such information to eliminate the incumbent's competitive advantage absent preferential treatment or some

³²⁸Citing 49 Comp. Gen. 28; *Aeronautical Instrument and Radio Co.*, B-224431.3, 86-2 CPD ¶ 170 (1986); and *Zodiac of North America Inc.*, B-220012, 85-2 CPD ¶ 595 (1985).

³²⁹*Master Security, Inc.*, B-232263, ¶ 449 (1988).

other type of unfair action on the part of the Government.³³⁰

As might be expected, disclosure of a contractor's proprietary data is serious business. *JL Associates, Inc.*³³¹ illustrates that disclosure of proprietary data already made public is not actionable. Here, the protester was currently within the first one year option term of a two option contract. In order to decide whether to exercise the second option, the agency issued an RFP which set forth the protester's unit prices. The protester alleged that revealing its option prices was a disclosure of confidential information. In denying the protest, the GAO found that in disclosing the prices, there was neither an impairment to the Government's ability to obtain like information in the future (as offerors will submit this information in hopes of getting the contract), nor a likelihood that release would cause substantial harm to the protester's competitive position as contract prices are available pursuant to requests under the Freedom of Information Act and are required to be disclosed to all unsuccessful offerees.³³² The decision did state, however, that if the disclosure of prices would reveal a contractor's overhead, profit rates, or multiplier, then the prices need

³³⁰*Id.*

³³¹B-239790, 90-2 CPD ¶ 261 (1990).

³³²*Id.* and FAR 15.1001(c)(iv).

not be disclosed under FOIA.³³³

3. *Technical Leveling*

Technical leveling is prohibited. It is defined as "helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal."³³⁴

Conceptually at least, it appears that technical leveling and transfusion are but two sides of the same coin -- that you can not have one without the other. For example, consider transfusion which involves the "transmission" of information from an offeror with a superior proposal to an offeror with an inferior proposal. When the offeror with the inferior proposal "receives" the information and makes use of it, its proposal has risen toward the level of the superior offeror. Thus, it would be hard to envision a case of actionable transfusion that did not involve a case of actionable

³³³*Id.* citing *Acumenics Research & Technology, Inc. v. Dept of Justice*, 843 F.2d 800 (4th Cir. 1988) and *Pacific Architects and Engineers Inc.*, 808 F.2d 1345 (9th Cir. 1990).

³³⁴FAR 15.601(d)(1) (emphasis added) and *Ultrasystems Defense, Inc.*, B-235351, 89-2 CPD ¶ 198 (1989) (no leveling where discussions merely ascertained what the offeror was proposing).

leveling.

Now consider leveling. This involves the "receipt" of information that brings an offeror's proposal up to the level of other superior proposals. If the Government discloses information from a superior offeror's proposal, then there is obviously also transfusion. Only if the Government "helps" an offeror without disclosing information from a superior offeror's proposal is there leveling without transfusion; however, rare will be the circumstance where the Government helps an offeror to bring its proposal up to the level of other proposals without disclosing information from a superior offeror's proposal.

Despite this analysis and the language of the FAR there is authority that the concepts of technical leveling and transfusion are entirely separate.³³⁵ Unfortunately, as Professor Nash points out,³³⁶ someone should tell the Comptroller General which has stated in one case that "the procuring activity engaged in technical leveling by disclosing

³³⁵Tidewater Consultants, Inc., GSBGA 8069-P.R. 85-3 BCA ¶ 18,458 (1985) at 92,725. As authority for this proposition, the board points to the fact that leveling and transfusion are set out in the FAR in the disjunctive. Not a compelling argument.

³³⁶See Nash, *supra* note 302 at 1 N & CR ¶ 2.

certain aspects of its proposal ..., "³³⁷ clearly confusing the two concepts -- unless, of course, the GAO was viewing the disclosure from the other side of the coin.

It has been suggested that the technical leveling definition in the FAR be changed to read

Technical leveling is helping an offeror to bring its proposal up to the level of other proposals by coaching or providing solutions or approaches desired by the agency.³³⁸

While this definition solves many of the problems with the existing FAR definition³³⁹ and would be a significant

³³⁷Id. citing Service Ventures, Inc., B-221261, 86-1 CPD ¶ 371 (1986).

³³⁸See Nash, *supra* note 302 at 1 N & CR ¶ 2 and 4 N & CR ¶ 62.

³³⁹Id. Professor Nash's comment that "coaching" is the "key issue" has not gone unnoticed -- the Comptroller General seems to use it as a synonym for leveling. See Virginia Technology Associates, B-241167, 91-1 CPD ¶ 80 (1991) (coaching amounts to technical leveling; agency not allowed to advise protester how to raise the level of its acceptable offer to the level of the awardee's); Warren Electrical Construction Corporation, 90-2 CPD ¶ 34 (1990) (no coaching despite three rounds of BAFOs, two site visits, and requests for clarifications where purpose was to understand what was being proposed and where the questions asked by the evaluators were the same questions asked of all offerors); Development Alternatives, Inc., B-235663, 89-2 CPD ¶ 296 (1989) (use of seven standard questions, although not the most direct, were adequate without causing leveling or coaching); Johns Hopkins University, B-233384, 89-1 CPD ¶ 240 (1989) (questions submitted to offerors were such that they could have induced offerors proposals to go up or down -- no coaching); Runyan Machine and Boiler Work, Inc., B-227069, 87-2 CPD ¶ 177 (1987) (agency letter to awardee even less specific than that to

improvement, it does not make clear that you can have technical leveling without transfusion. This can only be done through the elimination of the reference to "other proposals." Therefore, suggest it be changed to read

Technical leveling is helping an offeror revise its proposal by coaching or providing solutions or approaches desired by the agency.

One further complicating issue in this area involves the overlap of transfusion and leveling with the requirement that deficiencies in proposals be disclosed³⁴⁰ and discussions be meaningful.³⁴¹ At issue is the tension between the requirement to disclose deficiencies and the fear of technical leveling and transfusion (i.e., protest), which typically results in the reluctance of contracting officers to fully discuss deficiencies which can only serve to make a more effective procurement.³⁴² As has been pointed out,

protester -- no coaching); and Flight Systems, Inc., B-225463, 87-1 CPD ¶ 210 (1987) (no improper coaching where contracting officer pointed out a deficiency to awardee, followed by a clarifying amendment to the RFP to which the awardee provided an acceptable, revised proposal and no successive rounds of discussions).

³⁴⁰See *supra* Chapter III.C.

³⁴¹See, Love, *Why Can't Discussions Be Meaningful?*, 5 N & CR ¶ 42 (July 1991).

³⁴²*Id.* Mr Love contends that not only will a full discussion of deficiencies help the Government get what it wants, but it will also enable contractors to know specifically what to do to improve their proposal and meet the Government's needs, rather than by making a "guess." *Id.*

contracting officers are overly conservative with what they discuss -- only one protest has been upheld on the grounds of technical leveling and none has been sustained on technical leveling grounds.³⁴³ There is no simple solution to this problem as transfusion/leveling and meaningful discussions are inversely related -- too much discussion may trigger a transfusion/leveling protest; not enough disclosure of deficiencies means discussions were not meaningful. To effect a change in this balance will require a reassessment on the part of the Comptroller General and the GSBGA³⁴⁴ -- a reassessment that requires looking beyond the regulatory language in the FAR and fixing a problem that can make the system more efficient, effective and productive for both parties.

B. Contractor Performance Assessment Reports

The release of CPARS data was discussed above³⁴⁵ in connection with releasing that information to the contractor that was the subject of the CPAR. Is it possible for a competing contractor to gain access to this information? By regulation, CPARS data is protected from disclosure by its predecisional

³⁴³*Id.* The technical leveling case was Tidewater Consultants, Inc., *supra*, note 335.

³⁴⁴*Id.*

³⁴⁵See *supra* Chapter III.A.3.

nature, thus precluding access to such information requested pursuant to the Freedom of Information Act,³⁴⁶ and to the extent that a CPAR contains any proprietary data (trade secrets, confidential commercial or financial data), that too, would not be releasable under FOIA.³⁴⁷ Interestingly enough, no contractor has ever made a move to obtain access to information in the CPARS data base pertaining to other contractors. The reason? Industry likes the system and contractors undoubtedly do not want to break through this information barrier to obtain information on another contractor as that would allow others possible access to their CPARS information.³⁴⁸

C. *Preaward Survey Data*

The earlier analysis of preaward survey information focused on the release of that information to the contractor that was the subject of the report. The question here is whether or not one contractor could gain access to this kind of information from the Government on another contractor.³⁴⁹ As discussed

³⁴⁶5 U.S.C. § 552(b)(5).

³⁴⁷*Id.* at § 552(b)(4).

³⁴⁸Conversations with HQ AFSC/PKCP (Ms Diana Hoag) and ASD/PKCS (Mr Edward C. Martin) 11 Jun 1991.

³⁴⁹Note that "although it is possible that the mere initiation of a preaward survey can ... give rise to the inference that an offeror's price is not low in relation to the surveyed offeror, such necessary action of [sic] the part

above, preaward survey reports are typically not released even to a contractor that is the subject of the survey; however, research indicates that there is one recent case that involves the release of this information to a competing contractor.³⁵⁰ Dixon involved the award of firm fixed-price contract to Dynamic Control Corporation (DCC) for the development and production of the Harpoon Interface Adapter Kit (HIAK), an interface unit which allows the Air Force to utilize F-16 aircraft to launch AGM-84 Harpoon missiles.³⁵¹ The Comptroller General found that

Upon learning of the November 21, 1990 award to DCC, Dixon requested a copy of DCC's preaward survey from the agency under the Freedom of Information Act. The survey, performed by the Defense Contract Management Area Office (DCMAO), Hartford, Connecticut, recommended against award to DCC based on DCC's "inability to provide a tailored version of DOD-STD-2167A and 2168 at the time of the preaward survey." The survey also noted that DCC has been operating under "method C" corrective status since August 1989, but has made substantial progress and is in the process of resolving remaining problems. After receiving a copy of the survey, Dixon filed its protest. Mirage learned of DCC's negative preaward survey from Dixon, and filed a similar protest.³⁵²

of the government does not constitute an auction. The B.F. Goodrich Co., B-230674, May 18, 1988, 67 Comp. Gen. ____, 88-1 CPD ¶ 471." Braswell Shipyards, Inc., B-233287 & B-233288, 89-1 CPD ¶ 3 (1989).

³⁵⁰D.K. Dixon & Co.; Mirage Systems, B-242502 & B-242502.2, 1991 U.S. Comp. Gen. LEXIS 479, April 19, 1991.

³⁵¹*Id.*

³⁵²*Id.* (footnotes omitted; emphasis added).

A review of the protest file in this case reveals that DCMAO reported its findings in detail in the survey regarding the following areas of DCC's operations: plant facilities; materials and purchased parts; the number and source of employees; union affiliations; current workload breakdowns; production capabilities; quality assurance; company organization; program organization; manufacturing organization; and financial capabilities (in specific dollar amounts).³⁵³ The matter of concern is not that the documents were released, but who received them. Surely, DCC should be entitled to a copy of its preaward survey report (albeit without recommendations) under the Freedom of Information Act³⁵⁴, however, this type of information should never have been released without substantial redaction to a competing contractor.³⁵⁵ Further damage was done when Dixon released

³⁵³The preaward survey information attached to the protest file included the following forms prescribed by the FAR: FAR 53.301-1403 [Preaward Survey of Prospective Contractor (General)]; FAR 53.301-1405 (Preaward Survey of Prospective Contractor Production); FAR 53.301-1406 (Preaward Survey of Prospective Contractor Quality Assurance); and FAR 53.301-1408 (Preaward Survey of Prospective Contractor Accounting System).

³⁵⁴Recall the discussion at Chapter III.A.1. above where it was suggested that all prospective contractors about to be found nonresponsible should receive a copy of the preaward survey on which the contracting officer was basing the determination.

³⁵⁵The GAO has no authority to determine what information must be disclosed by the Government. Hunt Manufacturing Co., B-211563, 83-1 CPD ¶ 544 (1983). In that case a competing contractor wanted a copy of the preaward survey report on the awardee and the GAO advised the protester that its disclosure remedy was under FOIA, citing Westec Services, Inc., B-204871, 82-1 CPD ¶ 257 (1982).

the results of the survey to yet another competing contractor, Mirage, which also later filed a protest. What is not clear in this case is whether disclosure of this information was inadvertent or whether DCC was ever consulted and consented to the release of this information.³⁵⁶

D. Information on Prior Procurements or Contractors

Generally speaking, the Government is under no obligation to provide information on prior procurements or previous contractors.³⁵⁷ To this rule there are exceptions.³⁵⁸ The

³⁵⁶Exemption 4 of the Freedom of Information Act (5 U.S.C. § 552) deals with the release of proprietary contractor information and Executive Order No. 12,600, 3 C.F.R. 235 (1988) provides for mandatory notification to the submitters of confidential commercial information whenever an agency determines that it may be required to release such information under FOIA. *Id.* at § 1. Submitters are then given a reasonable period of time to object to the disclosure of the information. *Id.* at § 4. The agency is required to consider the objections of the submitter and provide submitters with written reasons why their objections were overruled. *Id.* at § 5. If the submitter can provide evidence of "actual competition and a likelihood of substantial competitive injury," the information cannot be released -- actual injury need not be shown. See *CNA Fin. Corp. v. Donovan*, 830 F. 2d 1132, 1152 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988). Typically, submitters challenge agency decisions to release in what has come to be called "reverse" FOIA suits.

³⁵⁷See *Drillers, Inc.*, *supra* note 94; *American Shipbuilding Co. v. United States*, 228 Ct. Cl. 220, 654 F.2d 75 (1981) and *Industrial Electronics Hardware Corp.*, ASBCA 10201, 11364, 68-1 BCA ¶ 6760 (1968). Cf. *Automated Services, Inc.*, GSBGA EEOC-2 & 3, 81-2 BCA ¶ 15,303 (1981) (Government breached its duty to communicate and cooperate with contractor in not revealing potential problems contractor would have with its computer system learned of by the agency through prior contracts).

courts and boards have created a dividing line between generalized information (which need not be disclosed) and specialized information which does.³⁵⁹ For example, in *Industrial Electronics*³⁶⁰ the board stated that

[T]he fact that the [Government's] general knowledge, with respect to the fact that the item was difficult to make and that prior contractors had encountered problems, was more extensive than, and superior to, appellant's is not material. In the context of the duty to disclose, superior knowledge on the part of the Government is only material when it is *specific* as to some fact that a contractor needs to know in order to produce an item that meets specifications and is either exclusive or is such that it is not available elsewhere.³⁶¹

³⁵⁸A contractor may be able to recover if the Government was the prior "contractor." See, *Price/CIRI Construction, J.V.*, ASBCA 36988, 37000, 89-3 BCA ¶ 22,146 (1989) (contractor recovered for additional effort required to scour heavily scaled pipes as Government knew of the heavy mineral deposits from its own earlier attempts to clean the pipes with the same method as proposed by the contractor).

³⁵⁹How the Government can know "generally" of difficulties in performance of a contract, and not either know or have a duty to inquire as to the "specifics" calls into serious question the Government's contract administration functions in these instances. See *Numax Electronics, Inc.*, *supra* note 103 (contractor recovered for unsuccessful efforts to produce a pistol part when the Government knew from previous contracts that the part could not be made in accordance with the specifications and earlier contractors had gotten waivers).

³⁶⁰*Supra* note 357.

³⁶¹*Id.* at 31,274 (emphasis added). See also *Wright Industries, Inc.* ASBCA 18282, 78-2 BCA ¶ 13,396 (1978); *American Shipbuilding Co. v. United States*, *supra* note 357; *Tar Heel Engineering and Manufacturing Co.*, ASBCA 15103, 72-1 BCA ¶ 9242 (1971); *Evans Reamer & Machine Co. v. United States*, 181 Ct. Cl. 539, 386 F.2d 873 (1967), *cert. denied*, 390 U.S. 982 (1968) *Lear Siegler, Inc.*, ASBCA 22235, 81-2 BCA ¶ 15,372 (1981), *mot. for reconsid. denied*, 82-2 BCA ¶ 15,832

While the decision in this case is supportable, it fails to make business sense. Although the Government need not disclose such data, when a contractor suffers any performance problem that could impact a future contractor (excluding those matters that could involve the improper disclosure of proprietary data) which the Government knew of prior to performance, it seems that awarding the contract without disclosing such knowledge borders on the commission of an intentionally stupid act. In light of the fact that this is the 1990s -- the age of computers, word processors, database programs, laser printers, fax machines, car phones, video-teleconferencing and the like, not to mention a shrinking defense budget and the possible loss of some long time major defense contractors -- there is no excuse not to fully and openly communicate with contractors and put all such information on the table before award. The result? Anticipation and pre-performance correction of problems to ensure that the Government gets what it wants, on time and within budget. On the other hand, critics of disclosure (of which there are many in the Government) argue that if the Government offers up evidence of even general prior contract difficulties, it may drive up bids/offers or perhaps discourage some contractors from competing.³⁶² However, the

(1982); and *Pacific Western Construction, Inc.*, DOTCAB 1084, 82-2 BCA ¶ 16,045 (1982), *mot. for reconsid. denied*, 83-1 BCA ¶ 16,337 (1983).

³⁶²See *American Shipbuilding Co.*, *supra* note 357.

Government must decide in these instances whether it would rather have a low cost bid/offer and risk nonperformance or pay a higher price to get what it needs. This should not require much thought since the Government has already attempted (at least once) to get the job done at the lowest cost, and while disclosure might drive the cost up slightly, this outweighs the high costs of later litigation.

Now consider *Federal Electric Corp.*³⁶³ which allowed the contractor an equitable adjustment in a contract for the manufacture of generators. The contract called for the use of lugs which could not be used without modification -- although the Government knew of the problem because two prior contractors had earlier difficulties with the lugs. In *Industrial Electronics*³⁶⁴ the same board keyed on the fact that the agency had never produced the item before and that the Government's knowledge was not exclusive;³⁶⁵ however, the same could be said about *Federal Electric Corp.* The rule that the Government need not disclose generalized information (*Industrial Electronics* -- item hard to make and prior

³⁶³ASBCA 13030, 69-2 BCA ¶ 7792 (1969). *Federal Electric Corp.* was followed in *C.M. Moore Div., K.S.H., Inc.*, *supra* note 102 (in spite of a contractor inspection and a Government furnished property "as is" clause, contractor recovered for breach of duty to disclose where Government knew the furnished property would have to be modified to function).

³⁶⁴*Supra* note 357.

³⁶⁵*Id.*

contractors had difficulties), but must disclose specific information (*Federal Electric Corp.* -- Government knew problem was with the lugs) begs the question as to what is generalized and what is specific. It may well be that it was the Government-provided specification that was critical in *Federal Electric Corp.*, and since the Government knew about the deficiency in the specification and refused to correct it, the board properly held the Government liable.

In 1987, a decision came down which blurred further the distinction as to disclosure of general versus specific information. In *Riverport Industries, Inc.* the Government was held liable for not disclosing a production history of product (typically "general" knowledge) -- the board calling the information "vital" as this history was unknown outside the Government.³⁶⁶

If the rule concerning disclosure of prior information was not difficult enough, making sense of it is made more complicated when one examines the cases that obligate the Government to provide information that is not directly related to performance of the contract at hand.³⁶⁷ For example, in the oft-cited case of *J.A. Jones Construction Co.*,³⁶⁸ the court held the Government should have disclosed to the contractor

³⁶⁶ASBCA 30888, 87-2 BCA ¶ 19,876 (1987).

³⁶⁷See Latham, *supra* note 42 at 201-207.

³⁶⁸*Supra* note 93.

the existence of other classified projects in the area that had significantly escalated the wage rates.³⁶⁹

Finally, the experience level of a contractor is also a factor in nondisclosure cases and the Government may not be required to give out details of difficulties experienced by predecessor contractors if the problems should have been apparent to a contractor experienced in the field.³⁷⁰

E. Investigative Reports

Recently, one court had occasion to entertain the issue as to whether an agency can disclose an investigative report to a competing contractor, who was not the subject of the report. In *ISC Group, Inc. v. United States Department of Defense et al.*,³⁷¹ at issue was the release of an investigative report containing "operations statements, financial summaries and forecasts, inventory and labor data, and other financial analyses"³⁷² to a competing contractor. The court denied

³⁶⁹See also, *Aerodex Inc.*, *supra* note 93 (Government knew or should have known that a supplier of an item would not cooperate with contractor) and *Kaplan Contractors, Inc.*, GSBICA 2747, 70-2 BCA ¶ 8511 (1970) (contractor recovery for failing to disclose sole supplier of a product). See also imputation cases cited at *supra* note 117.

³⁷⁰*Intercontinental Manufacturing Co. v. United States*, 4 Cl. Ct. 591, 2 FPD ¶ 117 (1984).

³⁷¹35 CCF ¶ 75,667 (D.D.C. 1989).

³⁷²*Id.* at 82,671.

access on two grounds. First, the court held that the report was exempt from disclosure under FOIA exemption (b)(4) as the report contained information that was "confidential."³⁷³ The court gave great weight to the fact that

[T]he report ... was submitted under DOD's voluntary disclosure program, which was adopted in 1986 to encourage defense contractors to establish a program of self-governance and voluntary disclosure.... Disclosure of information submitted under a confidentiality agreement could undermine the ability of the government to obtain such information. This would jeopardize the effectiveness of the voluntary disclosure program and the ability of DOD to police its contracts with private companies. From a broader perspective, disclosure of such information would raise serious questions about the integrity of the government in promising confidentiality to future submitters.³⁷⁴

The court also found that the report was "confidential" and exempt from release under (b)(4) because release of the report was likely to impair the ability of the Government to obtain goods and services in the future.³⁷⁵

The second ground the court used to withhold the report was the same as that often used to withhold audit reports as discussed earlier -- exemption (b)(7).³⁷⁶ In this case, the

³⁷³*Id.*

³⁷⁴*Id.* at 82,672.

³⁷⁵*Id.*

³⁷⁶*Id.* at 82,674.

report at issue was produced by a private entity under the voluntary disclosure program and was used to subsequently begin a criminal investigation. The court held that even so, it was sufficiently connected to the criminal investigation to be protected under (b)(7).³⁷⁷ Further, the agency made an adequate showing that release of the report would interfere with prospective enforcement proceedings as "release of the report [was] likely to reveal the scope and focus of the investigation and the identities of potential targets."³⁷⁸ In concluding, the court held that no portions of the report were releasable, even after redaction.³⁷⁹ In essence, the right of a competing contractor to have access to information was outweighed by the proprietary nature of the information, the need to keep the investigative process free of interference and the need to preserve the integrity of the procurement process.

F. Audit Reports

Under certain circumstances, courts may require the Government to disclose proprietary information. In *Common Cause and David Cohen v. Department of the Air Force and John Stetson*³⁸⁰

³⁷⁷*Id.*

³⁷⁸*Id.*

³⁷⁹*Id.*

³⁸⁰27 CCF ¶ 80,501 (D.D.C. 1980).

the court ordered the release, pursuant to a Freedom of Information Act request, of ten DCAA audit reports on the operations of ten major defense contractors. The audits contained confidential data on employee strength, cost figures, salary data, problems areas discovered by the auditors, but did not detail corporate profits, losses, sales, net worth, assets, liabilities, or pricing. The material was not exempt under (b)(3) as it did not concern trade secrets; it was not exempt under (b)(4) since the information was over five years old); and it was not exempt under (b)(5) as the reports were not a part of the policy-making process.³⁸¹

³⁸¹*Id.*

V. Disclosure of Government Information

In the business, political or military worlds, information is the most critical commodity, often making the difference between winning, losing or even playing the game. Of late Congress has enacted laws and the executive departments have issued regulations that deal directly with the access to information. This chapter considers the disclosure of preaward acquisition-related information normally compiled by the agency from agency sources (not from incumbent or prospective contractors) and its releasability to Government contractors.

As has been seen, the access to information issue involves the balancing of the competing interests of the federal government against those of contracting industry. On the one hand, the Government's interests in the protection of acquisition-related information involve the following:³⁸²

1. The preservation of our national security through the

³⁸²Address by Brigadier General Thomas G. Jeter, (USAF, Ret.) to the National Contracts Management Association East Coast National Educational Conference (29 November 1990) and testimony of H. Lawrence Garrett III, Under Secretary of the Navy, recorded in S. Hrg. 101-20, Oversight of DoD's Management of Inside Information in the Acquisition Process: Hearing Before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, United States Senate, 101st Cong., 1st Sess., Feb. 24, 1989 (hereinafter referred to as "Senate Hearing") at 11.

classification and protection of any information which could damage, in any way, the defense of the United States.³⁸³ Currently there are laws in place to enforce this needed protection (e.g., The National Security Act³⁸⁴).

2. Maintaining a level playing field among competitors for Government contracts and assuring the integrity of the competitive process by:

- a. Avoiding actual or perceived unfairness, and,
- b. Avoiding actual or perceived competitive advantage by the unequal access to Government information or wrongful access to a competitor's proprietary information.

3. Maximizing full and open competition by releasing acquisition information to potential contractors.

4. Protecting the integrity of the deliberative and decision-making processes of the Executive Branch.

5. Protecting sensitive contractor proprietary information.

³⁸³DoD Regulation 5200.1R, Information Security Program, (Apr. 28, 1987) details the handling and release of classified defense information.

³⁸⁴Chapter 343, 61 Stat. 496 (1947) (codified in various sections of Titles 5 and 50 of the United States Code).

6. Minimizing the amount of potential confusion on the part of Government/industry personnel concerning the releasability of information, accomplished by either maximizing the amount of information disclosed, minimizing the amount of information disclosed, or more clearly defining the releasability rules.

On the other hand, primary among industry's concerns and interests in acquisition-related information are:³⁸⁵

1. Money. Contractors are in the business to make money. By having wide access to information, contractors hope to gain a competitive advantage in competing for contracts.

2. Conservation of resources. Quality products, especially weapon systems, requires long-term commitments on the part of the contracting industry. Access to information allows contractors to be responsive and make the type of investment decisions that will encourage their own productivity in light of today's limited defense budget.

3. Delivery of goods or services on time and within budget.

³⁸⁵See Jeter, *supra* note 382 and *Testimony of Aerospace Industries Association of America, Inc. Concerning Management of Procurement Related Information in the Defense Acquisition Process, Senate Hearing, supra* note 382 at 115.

4. Elimination of risk. Release of information eliminates the risk of sanction for acquiring information that may or not be releasable.

With these interests in mind, an examination of a few of the more topical issues in this area will be discussed followed by a detailed examination of the new DoD interim rule on the release of acquisition-related information.

A. *Disclosure of Cost Information*

Although the FAR offers a tremendous amount of guidance for contracting officers and contractors, it does not answer many of the difficult questions that arise in the course of a procurement, particularly where, as has been shown, it comes to what information the Government should disclose or not disclose. Throughout the FAR there are references to the release of information under the Freedom of Information Act³⁸⁶ and because FOIA requests often involve "complex issues," contracting officers are "cautioned" to "obtain guidance from the agency officials having Freedom of Information Act responsibilities."³⁸⁷ Sometimes the realities of the situation seem to pit provisions of the FAR and other agency

³⁸⁶See FAR Subpart 24.2.

³⁸⁷FAR 24.202(b).

regulations against FOIA.³⁸⁸ Caught in between is the contracting officer, whose exercise of discretion is often second-guessed. A few examples follow.

1. Release of Should Cost Analyses

A should cost analysis is, in effect, a type of Government estimate that is used to negotiate the cost of a follow-on procurement. Take, for example, the follow-on procurement of F-16 aircraft. Having won the award for the initial production and delivery of a specified number of F-16s, when it comes to purchasing more aircraft, General Dynamics will obviously be the sole source for the procurement. It simply does not make sense to waste time and money trying to develop a competitive source to build F-16s. Contractors like General Dynamics know that, when selected for award of a contract like the F-16, the follow-on contracts are money in the bank. When it comes time to reprocur, the Government need not jump through all the hoops required for an initial competitive contract, but there is a downside. Knowing that these follow-on contracts are a given, there is a tendency for

³⁸⁸FOIA can cut against good business sense. See *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988) where the plaintiff was seeking abstracts of negotiated procurements. The agency refused to release them as competition was so limited that release would in all likelihood elevate prices on future procurements. Although nondisclosure would keep prices down, there was no legal reason not to release the abstracts.

a contractor to "become inefficient and not properly attentive to economy of operation."³⁸⁹ In these instances, prior to award of a subsequent contract, the Government may accomplish a should cost analysis, which involves a team of agency evaluators going into the contractor's plant for a matter of weeks and, having observed plant management and operations, determining what the follow-on contract "should cost."

The FAR states that "[t]he objective of the should-cost analysis is to promote both short-and long-range improvements in the contractor's economy and efficiency by evaluating and challenging the contractor's existing workforce, methods, materials, facilities or management and operating systems to identify uneconomical or inefficient practices."³⁹⁰ This review is usually conducted for major systems acquisitions,³⁹¹ must be announced in the solicitation,³⁹² and can be conducted plant-wide, or can consist of a small-scale review of selected portions of the contractor's operations.³⁹³

³⁸⁹Armed Services Pricing Manual, Department of Defense, Vol I (1986) at 3-4.

³⁹⁰FAR 15.810(a).

³⁹¹FAR 15.810(b).

³⁹²FAR 15.810(f) and see Norfolk Ship Systems, Inc., B-219404, 85-2 CPD ¶ 309 (1985).

³⁹³FAR 15.810(c). See DFARS 215.810(b)(S-70)(i) which mandates should cost analyses for major systems acquisitions over \$100 million if certain criteria are met.

Upon completion of the analysis, a report must be issued in accordance with agency procedures.³⁹⁴ Specifically, contracting officers "shall consider the findings and recommendations ... in the ... report when negotiating the contract price,"³⁹⁵ and once price is agreed upon, the contracting officer will provide the administrative contracting officer with "a report of any identified uneconomical or inefficient practices, together with a report of correction or disposition agreements reached with the contractor."³⁹⁶

The should cost report is of obvious critical importance to both the Government and the contractor; however, the FAR only addresses the distribution of the report within agency channels, with no mention of disclosure to the contractor. As a practical matter, in instances where a should cost analysis has been done, it would seem to both parties' advantage to fully and openly discuss the findings and recommendations. Contracting officers, vested with discretion,³⁹⁷ look for

³⁹⁴FAR 15.810((e)).

³⁹⁵FAR 15.810(e).

³⁹⁶*Id.*

³⁹⁷See *Senate Hearing supra* note 382 at 286 and 425 -- compare (1) Army Material Command Regulation 715-92, *Should Cost* (May 4, 1983) at ¶ 8c(3) cautioning against disclosure of should cost information which could weaken the Army's negotiating position -- and where disclosure of the report is not subject to discretion with (2) the Air Force position that only release of this information to contractors other than

guidance in the regulations and find little support for disclosure, reinforcing their tendencies toward nondisclosure. The FAR states that the should cost analysis is to be used to "develop realistic price objectives for negotiation"³⁹⁸ and negotiating the contract price."³⁹⁹ Typically, contracting officers are reluctant to disclose such information, as well they should be. On the other hand, however, if the Government is to "challenge"⁴⁰⁰ the contractor's operation and must provide a report of "correction or disposition agreements reached with the contractor,"⁴⁰¹ that will be impossible without disclosure.

Agency directives are far from consistent here. One agency pamphlet states that the should cost team report "will be used in the preparation of the Air Force prenegotiation objective"⁴⁰² -- clearly something that should not be disclosed,⁴⁰³ and the contracting officer is required to attach a copy of the price negotiation memoranda to the should

the one that is the subject of the report is prohibited.

³⁹⁸FAR 15.810(a).

³⁹⁹FAR 15.810(e).

⁴⁰⁰FAR 15.810(a).

⁴⁰¹FAR 15.810(e).

⁴⁰²Air Force Pamphlet 70-5, *Should Cost* (Nov. 17, 1989) at ¶ 18.

⁴⁰³Compare with the Air Force regulation, *supra* note 397.

cost report.⁴⁰⁴

The FAR should explicitly encourage (if not mandate) the exchange of should cost information between the Government and a contractor. Contractors are not by nature inefficient and uneconomical -- and it may well be that the should cost team could be wrong. Only if this information is disclosed can these issues be resolved, and the sooner the better.⁴⁰⁵

2. Release of Price Negotiation Memoranda (PNMs)

Unlike should cost information which is prepared prior to price negotiations, a PNM is "promptly" prepared at the "conclusion" of initial or revised price negotiations.⁴⁰⁶ At a minimum, the memorandum must contain:

- (1) The purpose of the negotiation.
- (2) A description of the acquisition
- (3) The name, position, and organization of each person representing the contractor and the Government in the negotiation.

⁴⁰⁴*Id.* at ¶ 19d. It would seem to make more sense to make the should cost report an attachment to the price negotiation memorandum.

⁴⁰⁵The best time to resolve matters is prior to, but not later than, the outbrief of the should cost team. On the other hand, industry's request for should cost information "before the issuance of the RFP" clearly seems to be premature. See *Senate Hearing*, *supra* note 382 at 135.

⁴⁰⁶FAR 15.808(a), Price Negotiation Memorandum. See generally, the Armed Services Pricing Manual (1986) at 8-27 through 8-33 for a discussion of PNMs.

(4) The current status of the contractor's purchasing system when material is a significant cost element.

(5) If certified cost or pricing data were required, the extent to which the contracting officer--

(i) Relied on the cost or pricing data submitted and used them in negotiating the price; and

(ii) Recognized as inaccurate, incomplete, or noncurrent any cost or pricing data submitted; the action taken by the contracting officer and the contractor as a result; and the effect of the defective data on the price negotiated.

(6) If cost or pricing data were not required ... the exemption or waiver used and the basis for claiming or granting it.

(7) If certified cost or pricing data were required ... the rationale for such requirement.

(8) A summary of the contractor's proposal, the field pricing report recommendations, and the reasons for any pertinent variances....

(9) The most significant factors or considerations controlling the establishment of the prenegotiation price objective and the negotiated price including an explanation of any significant differences between the two positions

(10) The basis for determining the profit or fee prenegotiation objective and the profit or fee negotiated.⁴⁰⁷

While research indicates that there has yet to be a court case deciding the releasability of a PNM, there have been a number of agency-level instances where a contractor has tried to gain access to a PNM via a FOIA request on a procurement for which it was the awardee.⁴⁰⁸ The prevailing view appears to be that

⁴⁰⁷FAR 15.808 (a)(1-10).

⁴⁰⁸Hollman, HQ USAF/JACL Point Paper, Notes on Releasability of Price Negotiation Memoranda (Jun. 2, 1989).

PNMs are releasable;⁴⁰⁹ however, at issue is whether the requester gains access to the document in a redacted or unredacted manner. In other words can portions of a PNM containing purely factual material be withheld?

An examination of the agency FAR supplements indicates a lack of uniformity on this issue.⁴¹⁰ In addition, there is a tension in the FAR and its supplements between loading up PNMs with information that should not be released⁴¹¹ in order to create a solid record of price negotiation and the normal releasability of price information post-award.⁴¹² Further complicating matters are agency regulations requiring the

⁴⁰⁹*Id.*

⁴¹⁰Although none of the supplements speaks directly about disclosure only one implicitly allows for release of the document to a contractor. NAPS 15-808.90 [normally only Navy officials will sign the PNM; however, this provision allows the Navy flexibility to have the contractor's representative verify and sign the PNM. NAPS 15-808.90(b). Although no contractual obligation results from the execution of a bilateral PNM, the document may be of use if a later dispute arises as to the issues contained therein. This approach has been cited with favor by Professors Cibinic and Nash. Cibinic and Nash, *Formation of Government Contracts*, supra note 125 at 940]. See also, DEAR 915.808 [dividing the PNM into two parts: (1) the pre-negotiation plan, and (2) the post-negotiation summary]; TAR 1215.808(a)(2) and NASA FAR SUP 18-15.808 (stating that, among other things, the PNM serves as a detailed summary of "the methodology and rationale used in arriving at the final negotiated agreement."); DLAR 15.808 ("excessive detail should be avoided" in the PNM); and DFARS 15.808(a) (requiring that all PNMs be marked "FOR OFFICIAL USE ONLY").

⁴¹¹See FAR 15.808(a)(8-10).

⁴¹²See FAR 15.1001, Notifications to Unsuccessful Offerors.

intermingling of documents.⁴¹³

Essentially then, the matter becomes one of whether the PNM can be withheld in its entirety under exemption (b)(5) of FOIA.⁴¹⁴ The answer to this question involves two basic sub-issues.

A. Is a PNM an "inter-agency or intra-agency memorandum?"⁴¹⁵ Clearly it is as it is a "memorandum" created by the agency, not circulated beyond the agency, and "is part of the deliberative process."⁴¹⁶ An analogy could be drawn between the contents of a PNM and documents created in the process of settlement negotiations which have been held under limited circumstances to qualify for exemption.⁴¹⁷

B. Is a PNM subject to the deliberative process privilege, used to "prevent injury to the quality of agency

⁴¹³See AFP 70-5, ¶ 19d, *supra*, note 402.

⁴¹⁴5 U.S.C. § 552(b)(5) exempts from disclosure "inter-agency or intra-agency memorandums or letters"

⁴¹⁵*Id.* and see generally, U.S. Department of Justice Freedom of Information Case List (September 1990) (hereinafter referred to as DoJ FOI Case List) at 437.

⁴¹⁶See DoJ FOI Case List, *supra* note 415 at 437-438 citing, *Ryan v. Department of Justice*, 617 F.2d 781, 790 (D.C.Cir. 1980).

⁴¹⁷See DoJ Case List, *supra* note 415 at 439.

decisions?"⁴¹⁸ Underlying this privilege are the following three policy purposes:

(1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action.⁴¹⁹

To be privileged, a PNM must meet two requirements.⁴²⁰ First it must be considered predecisional.⁴²¹ Although a PNM could be viewed as a predecisional document as part of a contract to be approved,⁴²² a recent case has held that a PNM which indicated agency approval of price was a final, binding agreement on price.⁴²³ However, the fact that a document was

⁴¹⁸*Id.* at 441, citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975).

⁴¹⁹*DoJ Case List*, *supra* note 415 at 441 (case citations omitted).

⁴²⁰*Id.*

⁴²¹*Id.* Whether a document is predecisional is subject to some fairly loose interpretation. See *id.* at 442-443.

⁴²²"[I]t is useful to examine the direction in which the document follows along the decisionmaking chain. Naturally, a document 'from a subordinate to a superior official is more likely to be predecisional'" *DoJ FOI Case List*, *supra* note 415 at 446.

⁴²³*Texas Instruments, Inc., v. United States*, 922 F.2d 810 (Fed. Cir. 1990) (a non-FOIA case).

once predecisional will not change even though a final decision has been made.⁴²⁴

Any argument that the agency might make relying on an analogy to the *Dudman Communications Corp.*⁴²⁵ decision may fail if the reasoning in the *Texas Instruments, Inc.*⁴²⁶ case is applied to foreclose any argument that a PNM is a draft document.⁴²⁷

Finally, an agency might try to argue that a PNM is not releasable as the factual portions of the document are so intertwined with the deliberative portions so as to render the entire document deliberative.⁴²⁸ In effect, "[i]f revealing factual information is tantamount to revealing the agency's deliberations, then the facts may be withheld."⁴²⁹

⁴²⁴DoJ FOI Case List, *supra* note 415 at 442 (citations omitted).

⁴²⁵*Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565 (Fed. Cir. 1987) (a radio broadcaster made a FOIA request for a certain "draft" Air Force historical document and the Air Force successfully invoked the (b)(5) exemption. The court held that release of the draft would reveal the Department's deliberative process as it would show alteration made during the process of compiling the final document.)

⁴²⁶*See supra* note 423.

⁴²⁷There is no question that the "price" portion of the PNM when approved is final. Whether the "negotiation" portions of the PNM would be releasable is another issue.

⁴²⁸DoJ FOI Case List, *supra* note 415 at 448.

⁴²⁹*Id.* This includes statistical information. e.g., technical scores and rankings of proposals).

The bottom line here is that the agency should release purely factual, nondeliberative, and segregable portions of PNMs. Typically, these requests are rare as the requesting contractor was the awardee of the contract and its representatives, having participated in the price negotiations, are all too aware of the factual information such as the date and time of the meetings, who attended, and the like. Contracting officers would be wise to draft PNMs with potential disclosure in mind such that deliberative sections (for example, a discussion detailing the reasons for the difference in the prenegotiation price objective and the negotiated price) could be redacted with ease at a later date. Contracting officers should be as forthcoming with as much information as possible as, if the releasability of PNMs is ever challenged in court, it may be held that the (b)(5) exemption does not protect PNMs *in toto*.

B. Release of Evaluation Factors/Subfactors/Scoring

This area provides a classic example of competing interests for the disclosure of information in Government contracting. On the one hand, the Government tries to protect its decision-making processes. On the other, contractors need this type of information to make their proposals as strong as possible so they are competitive and, in some instances, seek scoring results to gain or maintain a competitive edge.

1. Disclosure of Evaluation Factors

Although the Comptroller General allows broad discretion to agencies to determine which offeror will be best able to meet its needs, agencies may not conduct evaluations that are unreasonable or inconsistent with evaluation criteria listed in the solicitation.⁴³⁰ The Comptroller General has stated on numerous occasions that solicitations should have been more explicit in informing offerors of the evaluation criteria.⁴³¹

"[P]rocurring agencies must give sufficient detail in solicitations so to allow offerors to intelligently prepare their proposals and compete on an equal basis."⁴³² The FAR provides straight forward guidance to contracting officials on the disclosure of evaluation factors, the underlying principle being that only if the Government discloses the criteria to be used for evaluation of proposals will contractors be able to prepare a competitive offer. The FAR requires the agency to

Identify all factors, including price or cost, and any significant subfactors that will be considered

⁴³⁰Jack Faucett Associates, B-233224, 89-1 CPD ¶ 115 (1989), citing Programmatic, Inc., et al., B-228916.2 et al., 88-1 CPD ¶ 35 (1988).

⁴³¹See, e.g., Litton Systems, Inc., B-239123, 90-2 CPD ¶ 114 (1990).

⁴³²Quantum Research, Inc., B-242020, 91-1 CPD ¶ 310 (1991), citing GP Taurio Inc., B-238420.2, 90-1 CPD ¶ 497 (1990).

in awarding the contract ... and state the relative importance the Government places on those evaluation factors and subfactors.⁴³³

The solicitation shall clearly state the evaluation factors, including price or cost and any significant subfactors, that will be considered in making the source selection and their relative importance.⁴³⁴

a. Disclosure in the Solicitation

"[W]hile agencies are required to identify the major evaluation factors, they are not required to explicitly identify the various aspects of each which might be taken into account, provided that such aspects are reasonably related to

⁴³³FAR 15.406-5(c) Section M, Evaluation factors for award. See also Cibinic, *Postscript: Award Without Discussions*, 5 N & CR ¶ 1 (January 1991) which details the latest changes for DoD in this area as set forth in Section 802 of the DoD Authorization Act for 1991. Professor Cibinic states that the Act requires "RFPs to include any significant subfactors and to 'establish the relative importance of' the factors and subfactors used," and is hopeful that this change will be incorporated in the FAR.

Despite the language that "all factors" must be identified, one factor need not be disclosed. The evaluation of risk is inherent in the evaluation of technical proposals. Contraves USA, Inc., B-241500, 91-1 CPD ¶ 17 (1991); and Advanced Systems Technology, Inc.; and Engineering and Professional Services, Inc., B-241530 & B-241530.2, 91-1 CPD ¶ 153 (1991) citing Honeywell, Inc., B-238184, 90-1 CPD ¶ 435 (1991). For a discussion of this subject, see Cibinic, *Evaluation of Risk in Competitive Negotiated Procurements: A Key Element in the Process*, 5 N & CR ¶ 22 (April 1991).

⁴³⁴FAR 15.605(e).

or encompassed by the stated criteria."⁴³⁵

"[T]he precise numerical weight to be used in evaluation need not be disclosed" in a solicitation;⁴³⁶ however, there is nothing that precludes an agency from releasing this information,⁴³⁷ absent express guidance such as that in DoD which forbids disclosure of numerical evaluation weights outside the source selection advisory council or the source selection authority.⁴³⁸ In fact, some agencies include the entire source selection plan in the RFP to ensure that all evaluation factors are disclosed.⁴³⁹

⁴³⁵Human Resources Research Organization, B-203302, 82-2 CPD ¶ 31 (1982) citing Bell & Howell Corp., B-196165, 81-2 CPD ¶ 49 (1981) and Buffalo Organization for Social and Technological Innovation, Inc., B-196279, 80-1 CPD ¶ 107 (1980).

⁴³⁶Chadwick-Helmuth Co., B-238645.2, 90-2 CPD ¶ 400 (1990) (Army not required to disclose penalty point system of evaluation), citing Technical Services Corp., B-214634, 85-1 CPD ¶ 152 (1985) (protest denied where solicitation contained the statement that cost was of secondary importance to technical factors and where 20 percent is a significant percentage).

⁴³⁷Agencies are cautioned that if they disclose the weights, they must be followed. See Danville-Findorff, Ltd, B-241748, 91-1 CPD ¶ 232 (1991) (agency assigned only 40 points to technical factors when the solicitation called for 60).

⁴³⁸Hughes, *Acquisition-Related Information Within the Department of Defense*, ABA Pub. Cont. L. Seminar, *Procurement Integrity and Compliance* (Nov. 3, 1989) at Tab K, p. 25.

⁴³⁹Cibinic and Nash, *Formation of Government Contracts*, *supra* note 125 at 563.

Confusion over evaluation criteria creates poor proposals and takes up agency time in evaluation, discussions, clarification requests, deficiency notices and possible later litigation. If an agency knows it will use certain criteria, they will do well to set them forth in the solicitation and if an agency contemplates discussing evaluation factors in debriefings, it should be sure to disclose them or a protest will surely be triggered.⁴⁴⁰

Agencies normally disclose evaluation criteria, but disappointed contractors will allege that the criteria were not set forth with specificity. RFPs must list major evaluation factors, but need not specifically identify all aspects of each major factor.⁴⁴¹

⁴⁴⁰Burnside-Ott Aviation Training Center, B-229793, 88-1 CPD ¶ 236 (1988) (based on statements made at the debriefing, protester argued award was made on undisclosed evaluation factors).

⁴⁴¹See, e.g., Holmes & Narver, Inc., B-239469.2 & B-239469.3, 90-2 CPD ¶ 210 (1990) ("use of subcontractors" not listed as an evaluation factor or subfactor, but was considered reasonably related to an "organization structure and staffing plan" evaluation factor); Tidewater Health Evaluation Center, Inc., B-223635.3, 86-2 CPD ¶ 563 (1986) (protester's failure to list medical equipment was appropriately evaluated under such factors as patient safety, and medical supplies); Washington Occupational Health Associates, Inc., B-222466 86-1 CPD ¶ 567 (1986) (though not mentioned in the RFP, the agency properly used board certification as an evaluation criteria in a contract for health services which was determined to be reasonably related to the stated criteria of training and experience); but cf. Swintec Corp. et al. B-212395.2 et al., 84-1 CPD ¶ 466 (1984) (protest sustained where IFB failed to adequately disclose evaluation criteria -- solicitation did not reveal requirements for text and page format capabilities) and Randolph Engineering Co., B-192375, 79-1 CPD ¶ 465 (1979) (protest sustained where two evaluation factors ["excellence

Even if the agency failed to properly disclose factors or subfactors, the protester will not recover if there was no prejudice.⁴⁴²

b. Disclosure Other Than in the Solicitation

While disclosure of evaluation factors in the solicitation is certainly the preferred method, disclosure need not be made in the solicitation if it has been made elsewhere. For example, oral disclosure, under certain circumstances may be proper.⁴⁴³

As long as the agency discloses the criteria in an appropriate

of work" and "remarks"] were so broad and vague that they could not serve as a basis for evaluation.

⁴⁴²See, *Danville-Findorff, Ltd.*, *supra* note 437 (protest denied where unannounced evaluation factor was scored, but protester was not prejudiced); *Richard S. Carson & Associates, Inc.*, GSBGA No. 9411-9, 88-2 BCA ¶ 20,778 (1988) and *Supreme Edgelight Devices, Inc.*, B-230265, 88-1 CPD ¶ 584 (1988) (no prejudice where disparity between protester's offer and that of awardee was so great); and *Brennan Associates, Inc.*, B-231554, 88-2 CPD ¶ 203 (1988) (protester alleged the agency failed to inform it of the experience levels the agency was looking for -- protest denied where protester did not affirmatively state it could have met the experience requirements).

⁴⁴³See *Cerberonics, Inc.*, B-227175, 87-2 CPD ¶ 217 (1987) [oral disclosure of evaluation criteria (lowest priced, technically acceptable offeror) sufficient where the RFP was oral]; *Ferguson-Williams, Inc.*, B-231827, 88-2 CPD ¶ 344 (1988) (oral disclosure at a preproposal conference of the use of price as a tiebreaker upheld); and *Human Resources Research Organization*, *supra* note 435 [proposal found deficient when it failed to satisfy an evaluation factor not specifically set forth in the solicitation (although reasonably related to an express criteria) and where it was revealed as an evaluation factor in two rounds of discussions].

manner, any protest challenging the use of the evaluation criteria will be denied.⁴⁴⁴

2. Disclosure of Evaluation Subfactors⁴⁴⁵

Much the same as the Government need not necessarily disclose all criteria if they are reasonably related to listed evaluation factors, all subfactors need not necessarily be disclosed. "[A]gencies are not required to list all subfactors which may be used for evaluation purposes so long as those subfactors are reasonably related to the RFP's stated

⁴⁴⁴See General Kinetics, Inc., B-190359, 78-1 CPD ¶ 231 (1978) (failure to include evaluation criteria in the RFP can be cured after receipt of proposals by amendment) and 51 Comp. Gen. 102 (1971) (protest denied where a report containing the explanation of the evaluation criteria was omitted from the solicitation, but the solicitation referenced the report). But cf., Southern Air Transport, B-215313, 84-2 CPD ¶ 637 (1984) (protester has a duty to inquire as to the method of evaluation before submitting a proposal where the solicitation does not state how price will be evaluated -- solicitation procedures do not allow an agency to evaluate proposals by methods announced after proposals are received unless offerors have an opportunity to revise their proposals) and Southwest Marine, Inc.--Request for Reconsideration, B-219423.2, 85-2 CPD ¶ 594 (1985) [disclosure of evaluation criteria (technical over price) in a voluminous amendment sustained where protester had acknowledged receipt].

⁴⁴⁵With the latest change within DoD, the relative importance of subfactors to factors will become more important. No doubt what gave rise to this increased attention was some of the prior cases. See e.g., Hollingshead International, B-227853, 87-2 CPD ¶ 372 (1987) (the fact that a subfactor was worth more than five factors should have been disclosed even though the subfactor was reasonably related to a listed factor) and Compuware Corp., GSBICA No. 8869-P, 87-2 BCA ¶ 19,781 (1987) (protest sustained where the undisclosed subfactors changed the overall evaluation scheme).

evaluation criteria."⁴⁴⁶

The same basic rules apply to the disclosure of subfactors as do to the disclosure of factors. For example, if the subfactors are not properly disclosed in Section M, yet are set forth in the RFP instructions, a protest will be denied.⁴⁴⁷

3. Disclosure of Evaluation Scores

The FAR specifically prohibits the release of scores.

[P]oint-by-point comparisons with other offerors' proposals shall not be made. Debriefing shall not reveal the relative merits or technical standing of competitors or the evaluation scoring.⁴⁴⁸

This may be the rule, but it has not been strictly adhered to. In one case, while the GAO has refused to release other

⁴⁴⁶*Quantum Research, Inc.*, supra note 432, citing *Harris Corp.*, B-235126, 89-2 CPD ¶ 113 (1989) and *Consolidated Group*, B-220050, 86-1 CPD ¶ 21 (1986). See *Federal Auction Service Corp.*, B-229917.4 et al., 88-1 CPD ¶ 553 (1988) (subfactors of number of full-time employees, number and location of offices were related to the factor of marketing approach and organizational ability) and *Rapid America Corp.*, B-214664, 84-2 CPD ¶ 696 (1984) (undisclosed subfactors of costs of transferring telephone switching equipment, value of employee downtime and lost computer time and the printing of new stationery were related to a moving cost evaluation factor).

⁴⁴⁷*Mantech Technical Services Corp.*, B-235654, 89-2 CPD ¶ 243 (1989).

⁴⁴⁸FAR 15.1003(b).

offerors' proposals and the evaluations thereof to a protester, it has released to protesters copies of "[their] own evaluation, the relative standing of proposals, and the source selection scoring plan because these were relevant and necessary to give the protesters a meaningful opportunity to develop their protests challenging the award selection."⁴⁴⁹

A request for scoring documents under the Freedom of Information Act will not likely succeed. In *Professional Review Organization of Florida, Inc.*,⁴⁵⁰ a contractor submitted a request "for statistical information, panel members' point scores and evaluations, opinions and recommendations."⁴⁵¹ The court denied the request on (b)(5) grounds "in that they necessarily reveal the deliberative process even where they may contain factual information."⁴⁵² The court did, however, authorize the release of the computer generated score sheets, with the scores and recommendations redacted, leaving only the rating categories which the requester could use to verify the factors used to evaluate the

⁴⁴⁹ G. Marine Diesel; Phillyship, B-232619 & B-232619.2, 89-1 CPD ¶ 90 (1989).

⁴⁵⁰ *Professional Review Organization of Florida, Inc. v. United States Department of Health and Human Services*, 607 F.Supp. (D.C.D.C. 1985).

⁴⁵¹ *Id.* at 427.

⁴⁵² *Id.* The court found that the scores awarded were "numerical expressions of opinion rather than 'facts.'" *Id.*

proposals.⁴⁵³

If the agency errs, it may disclose scores to re-level the playing field between competitors. In *Federal Data Corp.*⁴⁵⁴ the Department of Health and Human Services noted after award of the contract that it unintentionally had provided inaccurate information to offerors, and because of the critical need for the equipment, decided, rather than re-compete to "provide each offeror ... with ... (1) the identity of all offerors in the competitive range; (2) the total evaluated prices of all offerors; [and] (3) the total technical score of all offerors."⁴⁵⁵

C. DoD Interim Rule on the Release of Acquisition-Related Information

In 1988, due in great part to both Operations Undercover and Ill Wind, Senator Carl Levin (D-Michigan), the Chairman of the Subcommittee on Oversight of Government Management, undertook an investigation into the disclosure of pre-procurement information in the Department of Defense (DoD), resulting in

⁴⁵³*Id.* See also *SMS Data Products Group, Inc., v. United States Department of the Air Force*, 1989 U.S. Dist. LEXIS 3156 (March 31, 1989) [contractor's FOIA request for technical scores was denied pursuant to exemption (b)(5)].

⁴⁵⁴GSBCA No. P-9732-P, 89-1 BCA ¶ 21,414 (1989), *aff'd* 911 F.2d 699 (Fed. Cir. 1990).

⁴⁵⁵*Id.* at 107,925.

a Senate subcommittee hearing on the matter.⁴⁵⁶ In response to a committee request, DoD, the Air Force, the Army and the Navy provided voluminous information,⁴⁵⁷ prompting Sen. Levin to conclude that "a review of the services' policies and regulations reveals a system of rules and regulations that are highly complex, confusing, unclear, and occasionally misunderstood by the officials responsible for administering them."⁴⁵⁸ According to Senator Levin, this lack of clear guidance leads to three main results:⁴⁵⁹

⁴⁵⁶See Senate Hearing *supra* note 382.

⁴⁵⁷DoD and the three services listed 336 separate regulations, policy letters, guidelines, memoranda, instructions orders, notes and pamphlets concerning disclosure of procurement and planning information, several of which were over 100 pages long. This list of documents alone was 89 pages long. *Id.* at 2.

⁴⁵⁸*Id.* at 3. Interestingly, the committee did not address a major DoD avenue of dissemination of acquisition-related information -- through the Defense Technical Information Center (DTIC). DTIC is the focal point within DoD for acquiring, storing, retrieving, and disseminating scientific and technical information used to support DoD acquisitions. DTIC Handbook (DTICH) 4185.1, August 1990 and DoD Directive 3200.12, DoD Scientific and Technical Information Program (13 February 1983). DTIC is under the operational control of the Defense Logistics Agency and has access sites in Alexandria, VA; Albuquerque, NM; Boston MA; Los Angeles, CA; and San Diego, CA. DTICH 4185.1 at 1. DTIC services are available to agencies within DoD and its contractors as well as any other Government agencies and their contractors. *Id.* at 3. In addition, each military service has a DTIC counterpart. The Air Force, for example, has established Air Force Information for Industry Offices (AFIFIOs) as focal points where industry can obtain information on Air Force acquisitions, research and development requirements, plans and future needs. AFIFIOs are located in Alexandria, VA; Dayton OH; and Pasadena, CA. *Id.*

⁴⁵⁹See Senate Hearing, *supra* note 382 at 4-5.

a. Disclosure practices that vary depending upon the document, the branch of the service, the Government employee involved, and the diligence of the contractor in obtaining the information;

b. Pressure on Government procurement officials from industry to release information informally which should be released formally; and,

c. Award delays and increased litigation costs due to complaints from competitors about the alleged improper disclosures of information.

In the brief three and one-half hour hearing, the committee focused on a relatively few number issues and documents, finding that generally there are three types of problems concerning the dissemination of specific documents:⁴⁶⁰

(1) There is confusion over just what the rules are.

(2) Where there are rules, the rules are unclear.

(3) Practice, in fact, does not follow the rules.

In the course of his testimony before the committee, Mr H. Lawrence Garrett III, the Under Secretary of the Navy clearly

⁴⁶⁰Id. at 17.

set forth the Government concerns regarding the dissemination of information:

In disseminating Government planning and procurement information, the Government's needs as a customer to share information with its suppliers is constrained by at least 4 basic requirements--one ... is to protect the national security against release of information that would unduly benefit potential adversaries--second, to protect the integrity of the deliberative and decisionmaking process within the Executive Branch, and most particularly the integrity of the process by which the President's budget is developed; third, to protect the integrity of the competitive process itself; and fourth, to protect sensitive proprietary information submitted to the Government by private industry.⁴⁶¹

More specifically, the committee focused on (1) the release of the Mission Needs Statement (MNS)⁴⁶² and the fact that the DoD, the Army and the Navy release this document while the Air Force does not; (2) the protection of information marked "For Official Use Only" (FOUO);⁴⁶³ (3) the release of Statements of Work (SOWs) or Statements of Needs (SONs) which the Air Force releases, the Navy releases on occasion, and the Army refuses to release;⁴⁶⁴ (4) the necessity for service level regulations

⁴⁶¹Id. at 11.

⁴⁶²Id. at 17-20 and 33-34. Mission Needs Statements are compiled by each of the services pursuant to DoD instruction and are used to justify the procurement of new weapon systems.

⁴⁶³Id. at 20, 34-37, 43-45 and 59-60.

⁴⁶⁴Id. at 22.

implementing DoD directives;⁴⁶⁵ (5) the role and the quality of Government contractor personnel;⁴⁶⁶ (6) information disclosure to consultants;⁴⁶⁷ (7) the release of acquisition plans;⁴⁶⁸ and (8) the release of program objective memoranda (POMs).⁴⁶⁹

From the outset of the hearing, the outcome was certain; its approach was clear; the result was unnecessary -- more legislation.⁴⁷⁰ And that is exactly what happened. The

⁴⁶⁵*Id.* at 23-26.

⁴⁶⁶*Id.* at 28-30.

⁴⁶⁷*Id.* at 30-32, 36-40, 45-46 and 58-59.

⁴⁶⁸*Id.* at 34-37. Acquisition plans detail an integrated approach to a procurement including what to buy, how to buy it and who is responsible for purchasing the item. Acquisition plans are not released to contractors by any of the services.

⁴⁶⁹*Id.* at 39-40. POMs are not to be released; however, each service releases them, in direct violation of DoD Instruction 7045.7, Implementation of the Planning, Programming and Budgeting System (May 23, 1984) and DoD Directive 7045.14, The Planning, Programming and Budgeting System (May 22, 1984). For an overview of activities in DoD that generate acquisition-related information see Hughes, *supra* note 438.

⁴⁷⁰*Id.* at 7-9, quoting Senator William S. Cohen (R-Maine):

So when there aren't any rules, I think that we invite the kind of problems that we have seen in the past The first step in knowing whether the system has been breached, however, is to have clear rules of disclosure in place, and to have these rules uniformly applied. In other words, if there are no rules of the road, it is very hard to know whether someone--from either the government or the industry side--has violated the speed

committee drafted legislation that became law as § 822 of the National Defense Authorization Act for Fiscal Years 1990 and 1991,⁴⁷¹ requiring DoD to prescribe a single, uniform regulation for the dissemination of and access to acquisition-related information.

1. Key Rule Provisions

The new rule was to have been issued March 19, 1990, but was delayed by the Deputy Secretary of Defense until April 26th.⁴⁷² Further review by Assistant Secretary of Defense for Program Analysis and Evaluation and the DoD Comptroller convinced the Deputy Secretary to delay implementation of the rule pending resolution of whether of PPBS information could not only be withheld from release outside the Government, but also withheld from release to other Government agencies.⁴⁷³

limit.

⁴⁷¹P.L. 101-189.

⁴⁷²See 53 FCR 735.

⁴⁷³The early version of the rule stated that "[PPBS] information ... shall not be released, in any form, outside the Government in order to preserve the integrity of the DoD's programming [sic] and budgeting process." 53 FCR 657 at 658. The latest version states that "[PPBS] documents and supporting data bases are not to be disclosed outside the [DoD] and other agencies directly involved in the defense planning and resource allocation process (e.g., Office of Management and Budget)." 55 Fed. Reg. 28,614 (to be codified at 32 C.F.R § 286h) at 28,615 (*emphasis added*).

On July 12, 1990, the new interim rule was issued⁴⁷⁴ which added this new restriction on the release of PPBS data and increased the restriction on the release of PPBS documents from 11 subcategories to the now present 17.⁴⁷⁵

Ironically, although the rule is entitled "Release of Acquisition Related-Information" and purports to set forth the DoD policy for the release of information, the rule does nothing to define information that can be released; rather, the rule is written as a rule of nondisclosure.⁴⁷⁶ Specifically, the rule lists seven categories of information of restricted information: (1) release subject to statutory restriction; (2) classified information; (3) contractor bid or proposal information; (4) release of or access to source selection information (SSI); (5) planning, programming and budgetary information; (6) documents that disclose the Government's negotiating position; and (7) drafts and working papers.

⁴⁷⁴See Appendix E for a complete copy of the rule as proposed in 55 Fed. Reg. 28,614 (to be codified at 32 C.F.R. § 286h).

⁴⁷⁵*Id.*

⁴⁷⁶*Id.*

a. Release Subject to Statutory
Restriction⁴⁷⁷

This category of information is relatively straightforward. If the information cannot be released pursuant to a statute, then it cannot be released. If a statute allows disclosure, then the information may be released only if it is not restricted by any of the following six categories of the interim rule.

b. Classified Information

Again, there is not much room for discussion over this type of information. Classified information can only be released in accordance with existing security regulations.⁴⁷⁸

c. Contractor Bid or Proposal Information

In both sealed bids and negotiated procurements, this type of information may not be released prior to bid opening or award except to certain authorized personnel. After award, this information may be released, unless it has been marked with a restrictive legend or release is not otherwise restricted by

⁴⁷⁷The statutory, regulatory and policy guidance on the release of acquisition-related information is discussed in detail in Hughes, *supra* note 438.

⁴⁷⁸See, e.g., DoD Regulation 5200.1R, "Information Security Program Regulation" (Apr. 28, 1987).

statute.

The rule defines bid or proposal information as:

[I]nformation prepared by or on behalf of an offeror and submitted to the Government as a part of or in support of the offeror's bid or proposal to enter a contract with the Government, the disclosure of which would place the contractor at a competitive disadvantage or jeopardize the integrity or the successful completion of the procurement [including] cost or pricing data, profit data, overhead and direct labor rates, and manufacturing processes and techniques.⁴⁷⁹

Although this definition purports to definitively resolve what information can be released, it rightfully allows for the exercise of discretion on the part of persons releasing the data to determine, in the absence of a restrictive legend, whether release would put the contractor at a competitive disadvantage or disrupt the integrity of the procurement process. This may result in an overabundance of caution on the part of Government personnel not to release information and, perhaps more importantly, the overclassification of documents as bid or proposal information on the part of contractors to ensure nondisclosure of information to their competitors.

⁴⁷⁹See *supra* note 474 at § 286h.3(b)(3).

d. Release of or Access to Source Selection Information

Like the previous category, SSI can be information that may or may not be specifically marked as such with a restrictive legend, and consists of ten categories of information, the last one being a catch-all which includes "[a]ny other information which, if disclosed would give an offeror a competitive advantage or jeopardize the integrity or successful completion of the procurement."⁴⁸⁰

Prior to award, SSI can only be released by the contracting officer after an upchannel determination has been made that release is in the public interest and would not jeopardize the integrity of the system. After award, there is no need to protect SSI and the contracting officer may release the information unless the information was developed for use by a contractor for more than one solicitation, there is a continuing need to protect such information, nondisclosure is permitted by law, the information would reveal the relative merits or technical standing of the competitors or the evaluation scoring, or the information is protected from release under the Freedom of Information Act.⁴⁸¹ This area will be ripe for litigation and has caused one expert to

⁴⁸⁰Id. at § 286h.3(b)(4)(J)(1).

⁴⁸¹Id. at § 286h.3(b)(4)((ii)(2).

recommend the rule be changed to specifically identify which items of SSI are releasable after award and to change the FAR debriefing language⁴⁸² to specify that more information should be released.⁴⁸³

e. Planning, Programming and Budgetary Information

No other category of the interim rule has caused greater problems than this one. As noted above, the rule had once been issued and, after the Pentagon's budget gurus reflected a little more, they convinced the Deputy Secretary not only to increase the number of categories of information subject to nondisclosure from 11 to 17, but also managed to have disclosure of PPBS information withheld from other Government agencies -- a restriction even others in the Pentagon consider unnecessary.⁴⁸⁴

The Council of Defense and Space Industry Association's (CODSIA's) expressed concern here is that the clamp down on information is overly restrictive and at loggerheads with Government-industry total quality management (TQM) efforts to

⁴⁸²FAR 15.1003.

⁴⁸³See Jeter, *supra* note 382.

⁴⁸⁴54 FCR 57.

make the acquisition process more efficient.⁴⁸⁵ The major concern being that the rule is just too broad in defining PPBS information as including "supporting data" and "all other PPBS materials."⁴⁸⁶

Although industry would agree that not all PPBS should be disclosed so as to allow decision-makers the flexibility to make decisions without lobbyists' intrusions, the rule as written may work to deny industry information it needs to plan effectively and deny Government of industry feedback which is so vital in assessing technical/cost tradeoffs.⁴⁸⁷ Some suggestions being discussed to lessen the impact of this rule include lowering the approval level (to the program executive officer or the program manager) for the release of some PPBS information at, for example, the draft RFP stage.⁴⁸⁸ The earlier issues are discussed and the more information on the table can only lead to the avoidance of problems and litigation later on. In addition, it has been suggested that a "PPBS marking system" similar to that used for SSI would ease the burden especially for lower echelon Government

⁴⁸⁵53 FCR 423.

⁴⁸⁶See *supra* note 474 at 286h.3(b)(5)(i).

⁴⁸⁷See Jeter *supra* note 382.

⁴⁸⁸*Id.*

employees who might not know what they are releasing.⁴⁸⁹

f. Documents Disclosing the Government's
Negotiating Position

The rule here calls for a categorical exemption. Such things as pre-negotiation business clearances and positions and cost estimates or any other document that might adversely impact strategy shall not be released.⁴⁹⁰ This category may also be unnecessary as it does not ever (with or without upchannel approval) allow for the disclosure of this type of information even when it could be done evenhandedly and in situations where it would work to the advantage of the Government.⁴⁹¹

g. Drafts and Working Papers

Like the category immediately above, this category was not in the original rule and is not really needed as it is covered by the Freedom of Information Act.⁴⁹²

⁴⁸⁹*Id.* Note also that FAR 3.104-4(j) (1)(ii) requires contractors to mark the specific portions of information they consider proprietary. This requirement is not levied on the Government in FAR 3.104-4(k) causing some to believe that whatever the rule, it should be the same for both the Government and contractors to alleviate any undue burden. *Id.*

⁴⁹⁰*See supra* note 474 at 286h.3(b)(5)(ii)(6).

⁴⁹¹*See Jeter supra* note 382.

⁴⁹²*Id.*

h. Interplay of DoD Rule With Existing or
Proposed Statutes

In addition to the new DoD rule there are other sources of guidance on the release of acquisition-related information, that, unfortunately, are producing considerable confusion, bewilderment and fear.⁴⁹³ These include the Procurement Integrity Act⁴⁹⁴ and the Procurement Ethics Reform Act.⁴⁹⁵

(1) The Procurement Integrity Act

The Procurement Integrity Act was enacted as a political response to Operations Ill Wind and Uncover.⁴⁹⁶ Whether the Act was needed and the extent of legislation needed are still matters of great debate; however, this is one matter on which both contractors and agencies tend to agree -- the Act was unnecessary. Be that as it may, the statute is in effect (at least for now) and it essentially provides criminal sanctions for the following prohibitions: (1) Contractors cannot

⁴⁹³*Id.*

⁴⁹⁴41 U.S.C. § 423.

⁴⁹⁵S. 2775, 102nd Cong., 2d Sess. (1990) and see 53 FCR 867. The bill was not acted upon and on Feb. 21, 1991 the bill was reintroduced. S. 458, 103rd Cong., 2d Sess. (1991) and see 55 FCR 249.

⁴⁹⁶For an excellent history of the Act see Ryan, *Procurement Integrity Legislation and Regulatory Implementation Problems*, ABA Pub. Cont. L. Sect. Seminar, *Procurement Integrity and Compliance* (Nov. 3, 1989) at 2-12.

solicit or obtain pre-award proprietary or source selection information;⁴⁹⁷ (2) Government procurement officials cannot disclose proprietary or source selection information without authorization⁴⁹⁸; and (3) Persons with access to proprietary or source selection information may not disclose it to any unauthorized person without authorization.⁴⁹⁹ Adding to the confusion are the Act's definitions of proprietary information and source selection information⁵⁰⁰ which do not track the language of the DoD interim rule.

(2) The Procurement Ethics Reform Act

This Act was sent to Congress by the Bush administration on 20 June 1990 and again on 21 February 1991 to effectively rewrite the existing procurement integrity law.⁵⁰¹ The purpose of the Act is to identify sensitive procurement information and to severely sanction (criminally) those that misuse such information.⁵⁰² The approach of the proposal focuses on the protection of information rather than on the status of persons disclosing or obtaining the information, or at what particular

⁴⁹⁷41 U.S.C. § 423(a)(3).

⁴⁹⁸41 U.S.C. § 423(b)(3).

⁴⁹⁹41 U.S.C. § 423(d).

⁵⁰⁰41 U.S.C. § 423(p)(6) & (7).

⁵⁰¹See *supra* note 495.

⁵⁰²53 FCR 889.

stage of the procurement the information is generated.⁵⁰³ The proposal defines "contractor bid or proposal information" differently than does the DoD interim rule, by omitting profit data, although the definition of SSI is consistent in both documents.⁵⁰⁴

2. *The Future*

We will continue to see efforts to further legislate and regulate the (non)disclosure of information to industry. It appears to be a favorite topic amongst members of Congress. What is most troubling is that there are individuals, both Government and industry alike, who are honestly trying to make sense of this intensely complicated guidance. DoD seems to be in the thick of it. Title VIII of The National Defense Authorization Act for Fiscal Years 1990 and 1991 requires the Under Secretary of Defense for Acquisition to establish an advisory panel on streamlining and codifying acquisition laws. The panel is to review current acquisition laws, prepare a code of existing acquisition laws, and to propose for elimination any laws deemed unnecessary to ensure the best interests of DoD are protected. Stay tuned for its report and the resulting fallout.

⁵⁰³*Id.*

⁵⁰⁴*Id.* at 891.

VI. Conclusions

Throughout this paper a number of recommendations have been made regarding specific improvements or changes that might be considered. It is not the purpose of this section to reiterate what has already been said; but, rather, to address a few areas that are central to the disclosure of acquisition-related information.

The basic purpose for disclosing information to contractors is to get the Government intelligent, responsive and low cost bids and proposals. Often the Government has no legal obligation to disclose but should. Contractors compensate for nondisclosures by increasing the price of their bid/proposal or, ultimately, through litigation.

The federal procurement playing field has two intersecting tiers, both of which should be level.⁵⁰⁵ On the one hand, the Government must ensure preaward that all competing contractors are treated similarly and fairly;⁵⁰⁶ on the other, the Government's postaward dealings with contractors should be at

⁵⁰⁵See also, Stuart, *Government-Industry Contracting: What Should the Relationship Be?*, 17 Nat. Cont. Mgt. J. 47 (1983).

⁵⁰⁶See FAR 3.101-1 which states in part that "Government business shall be conducted in a manner above reproach and ... with complete impartiality and with preferential treatment for none."

arm's length, not adversarial. The Government's duty to disclose preaward is critical -- it is at this stage that contractors are scrambling for information which will form the bases of their offers, and the potential grounds for protest grow exponentially with the number of prospective contractors.

There is no question that with the advances in technology the Government will create and store more and more information -- information of great value to contractors. One of the Government's future goals should be the elimination of expensive and time consuming FOIA requests through the disclosure of releasable acquisition-related information.⁵⁰⁷ But what information is releasable? This is the tough question and, as has been shown, not even the armed services agree on the releasability of some documents. Perhaps releasability rules cannot be static. The procurement system must be flexible enough to cope with changing circumstances.⁵⁰⁸

One thing is certain. More laws and regulations are on the way. As with the DoD interim rule, the road will not be easy

⁵⁰⁷One should not confuse the releasability of information that will fuel a protest with the disclosure of information that may prevent one.

⁵⁰⁸See Schrage, *War Project Shows Pentagon Procurement Can Be Fast, Flexible*, The Washington Post, Jun. 14, 1991 at D3, col. 1 (Desert Storm "'anti-fratricide identification device' was designed, tested, built, shipped and deployed in 20 days. It even worked."

-- it has been two and a half years since Senator Levin's subcommittee decided that a uniform DoD disclosure policy was needed and it has yet to be finalized. Most agree that the proposed rule does little more than centrally locate the existing rules on the release of information. In effect, it was a political response to relatively rare criminal circumstances (Ill Wind) and will do little to change the way things are done. What is really needed is a way to educate and retain our procurement officials. Professors Cibinic and Nash contend that the problem is systemic and goes well beyond the issue of releasability. They state that

[N]on-compliance with contract terms and Government contracting rules ... is not a rare occurrence. By noncompliance we do not mean criminal activity, which we still believe to be rare....

Most instances of non-compliance are unintentional. Sometimes they result from negligence but more often are caused by ignorance. The Government and the contractor must share the blame. Personnel are often assigned to administer contracts without having adequate knowledge of contract terms and applicable rules. Small wonder, then, that the rules are often ignored.

Stating the solution is simple; implementing it, admittedly, will take some time doing. *Personnel should not be assigned to contract administration unless they know the rules and the importance of compliance.*⁵⁰⁹

⁵⁰⁹Cibinic and Nash, 2 N & CR Dateline December 1988 (emphasis in original). These words were echoed by Senator Herbert Kohl (D-Wis), see *Senate Hearing, supra* note 382 at 6:

[W]e need to find a way to make the process more professional. One of the

Beyond the issues of education and retention lies the discretion of Government procurement officials, and no matter how strictly drawn the procurement rules get, there will always be allowances for discretion to release (or not release) certain documents -- as is true even in the new DoD interim rule. And so it should be. Unfortunately, the primary avenue to resolve most disputes of alleged abuses of discretion is litigation. The search for a balance between rules and discretion was stated by the Assistant Secretary of the Air Force

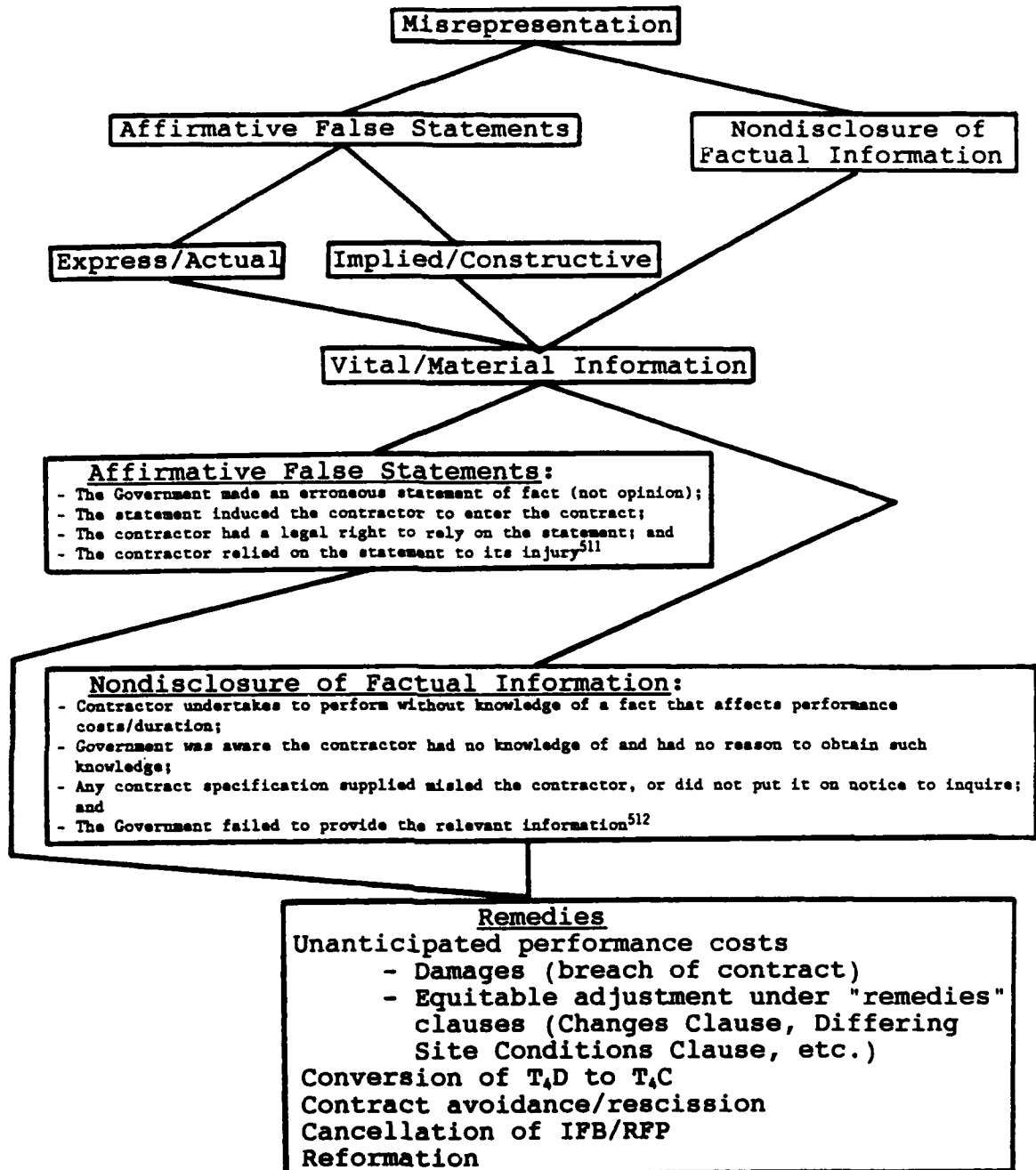
While we want clear and enforceable laws, policies and regulations, we also want efficiency, latitude for exercising sound judgment, and reliance on the demonstrated knowledge and integrity of the overwhelming majority of our acquisition personnel.⁵¹⁰

Congress should slow down and examine the effects of its actions in this area of the federal contracting arena. Its piecemeal legislation is having a deleterious effect and serves mainly as a full employment act for attorneys while

things that concerns me is that we give a lot of responsibility to people who are not always sufficiently well-trained to exercise that responsibility. This is not a criticism at all of the people, their abilities, or their motives. Instead, it is a criticism of a system which does not always offer adequate rewards to attract and retain the best people.

⁵¹⁰See Welch, *Senate Hearing supra* note 382 at 15.

placing both Government and contractor employees at risk for not knowing the rules. What is needed is "quality" legislation, not "quantity" legislation.



⁵¹¹Edwards, Edwards, and Dixon, *supra* note 103 at 10.

⁵¹²Petrochem, *supra* note 105 at 1079 and American Shipbuilding Co., *supra* note 357 at 78.

11 August 1988

Acquisition Management
Reference

CONTRACTOR PERFORMANCE ASSESSMENT

This regulation sets policy, assigns responsibilities, and provides procedures for systematically assessing contractor performance on current contracts. This regulation applies to Armament Division, Aeronautical Systems Division, Ballistic Missile Office, Electronic Systems Division, and Space Division. This regulation does not apply to the Air National Guard or to US Air Force Reserve units and members.

Section A—Air Force Systems Command Policy

1. Purpose of the Contractor Performance Assessment Reporting System (CPARS) and AFSC Form 125, Contractor Performance Assessment Report (CPAR):

a. The sole purpose of CPARS is to provide program management input for a command-wide performance data base used in AFSC source selections (AFRs 70-15 and 70-30 discuss source selection policy and procedures). Performance assessments will be used as an aid in awarding contracts to contractors that consistently produce quality products that conform to requirements within contract schedule and cost. The CPAR can be used to effectively communicate contractor strengths and weaknesses to source selection officials. The CPAR will not be used for any purpose other than the one in this paragraph.

b. The CPAR assesses a contractor's positive and negative performance on a given contract during a specific period of time. Each assessment must be based on objective facts and be supportable by program and contract management data, such as cost performance reports, technical interchange meetings, financial solvency assessments, production management reviews, contractor operations reviews, functional performance evaluations, and earned contract incentives. Subjective assessments concerning the causes or ramifications of the contractor's performance should be provided; however, speculation or conjecture should not be included.

c. The CPAR assessment process is designed with a series of checks and balances to facilitate objective and consistent evaluation of contractor performance. Both government and contractor program management perspectives are captured on the form. The assessment is reviewed by a level of management above the program director or manager to ensure consistency with other CPAR evaluations throughout

the product division and other internal reviews and evaluations of the program, such as command assessment reviews (CAR) and program assessment reviews (PAR).

2. Applicability and Scope:

a. The CPAR is limited to contracts for concept demonstration and validation, full-scale development (FSD), and full-rate production and deployment efforts. Laboratory (Science and Technology programs), service, and operations and maintenance efforts are not included. A CPAR must be completed on all such contracts over \$5 million (face value, excluding unexercised options) with any division or subsidiary of the contractors listed in attachment 1. When a single contract instrument requires segregation of costs for combining FSD and production efforts or containing multiple production lots, an individual CPAR may be completed for each segment of work.

b. Broadening the application of CPARS by a local activity to additional contract efforts and contractors requires AFSC/CV approval before implementation.

Section B—Responsibilities Assigned

3. HQ AFSC Responsibilities:

a. Deputy Chief of Staff, Systems (HQ AFSC/SD) ensures that the overall management and control of the CPARS is consistent with this regulation. Formulating and updating this regulation is a joint responsibility of HQ AFSC/SD and Deputy Chief of Staff, Contracting (HQ AFSC/PK).

b. HQ AFS/PK is responsible for maintaining the list of contractors in attachment 1.

4. Field Activity Responsibilities. The commander or vice commander of each of the involved field activities:

a. Establishes procedures to implement this regulation. Submit one copy of local supplements to HQ AFSC/SD.

b. Establishes a CPAR focal point. This focal point is responsible for the collection, control, storage, and distribution of CPARs prepared at the field activity.

c. Ensures timely completion of CPARs by program directors or managers.

d. Ensures timely review of CPARs by local re-

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viewing officials.

c. Ensures submission of the AFSC Source Selection Officers Report (para 8).

Section C—CPAR Procedures

5. Frequency of Reporting:

a. For new contracts, an initial CPAR will be completed between 180 and 365 days after contract award. Instructions for completing a CPAR are in attachment 2.

b. An intermediate CPAR will be completed on an annual basis for the entire period of performance of the contract. More frequent reporting is required when the program director or manager is aware of a change in performance that significantly alters the assessment of the contractor or when a change in program directors or managers occurs. Contractors may request that the CPAR be updated by the program office if a significant change in performance has occurred. Generally, no more than two CPARs a year should be prepared. An intermediate CPAR is limited to contractor performance occurring after the preceding CPAR. To improve efficiency in preparing the CPAR, it is recommended that the CPAR be completed together with other reviews (for example, PARs, CARs, award fee determinations, major program events, or program milestones).

c. A final CPAR will be completed upon contract termination or within 6 months following the delivery of the final major end item on contract. The final CPAR is limited to contractor performance occurring after the preceding CPAR.

6. CPAR Processing. Each CPAR is completed, reviewed, coordinated, and approved within AFSC. Contractor organizations will be given an opportunity to review and comment on the program director's or manager's preliminary assessment. The CPAR review and approval process is as follows:

a. The project manager or engineer responsible for the contract being reviewed prepares the preliminary documentation and assessment in coordination with the project team. This assessment should be based on multifunctional input. Support contractors, such as System Engineering and Technical Assistance or Federal Contract Research Center contractors, may provide input as project team members but are not allowed access to completed CPARs unless specifically authorized in support of a source selection. The project manager or engineer must ensure that all CPAR documentation and forms are marked "For Official Use Only/Source Selection Sensitive" according to AFR 12-30 and AFR 70-15, chapter 4.

b. The program director or manager responsible for the overall program reviews and transmits the preliminary CPAR to the contractor. The program director or manager must not sign item 17 until just before submitting the final assessment to the product division reviewing official. Program director or

manager narrative remarks are limited to item 16 plus one additional single-spaced typewritten page.

c. The program director or manager will retain a copy of the preliminary CPAR and transmit the original to his or her counterpart within the contractor's organization. Face-to-face meetings with contractor management to discuss initial CPAR ratings are strongly recommended. The transmittal letter must provide the following guidance to the contractor:

(1) Protect the preliminary CPAR as a source selection sensitive document.

(2) Strictly control access to the preliminary CPAR in the contractor organization.

(3) Do not release the preliminary CPAR to persons or entities outside the contractor's control. Do not use preliminary CPAR data for advertising, promotional material, preaward surveys, proposal submittals, production readiness reviews, or other similar purposes.

(4) Responses are optional; if provided, they are due within 30 days of the date of the transmittal letter and are limited to item 18 plus one additional single-spaced typewritten page. This page limit will be strictly enforced. Additional pages will not be reviewed or included in the CPAR data base. Contractor comments received after the 30-day period may not be included in the final CPAR.

(5) Focus comments on the objective portion of the program director's or manager's narrative and provide views on causes and ramifications of the assessed performance.

d. After receiving and reviewing the contractor's comments, the program director or manager may revise the preliminary assessment. Revised assessments must be recorded on a new CPAR form that will be attached to the original. Complete items 1 through 5 and mark item 12 "Revision to CPAR for period (insert period covered)." Indicate revised ratings in items 14 or 15 and explain the reasons for the changes made in item 16.

e. After receiving contractor comments or 30 days from the date of the transmittal letter to the contractor, whichever occurs first, the program director or manager will sign item 17 and send the CPAR to the product division reviewing official for review and signature according to local procedures. The product division reviewing official must be at least one level above the program director or manager.

f. After the CPAR is completed, the program director or manager will send the CPAR and all attachments to the CPAR focal point for input into the command-wide data base. No copies of the final CPAR will remain on file at the program office. Working papers associated with CPAR evaluations may be retained but must be protected as "For Official Use Only/Source Selection Sensitive."

g. All records created by this regulation will be retained and disposed of according to AFR 12-50.

Armament Division
AD/PMP
Eglin AFB FL 32542-5000
AV 872-3107/Commercial (904) 882-3107

Aeronautical Systems Division
ASD/PMP
Area B Bldg 125
Wright-Patterson AFB OH 45433-6503
AV 785-5912/Commercial (513) 255-5912

Ballistic Missile Office
BMO/PKK
Norton AFB CA 92409-6468
AV 876-4631/Commercial (714) 382-4631

Electronic Systems Division
ESD/PKP-2
Bldg 1217
Hanscom AFB MA 01731-5000
AV 478-5853/Commercial (617) 861-5853

Space Division
SD/PMOM
P. O. Box 92960
World Way Postal Center
Los Angeles AFB CA 90009-2960
AV 833-0602/Commercial (213) 643-0602

Figure 1. List of CPAR Focal Points.

7. CPAR Focal Point. Each field activity CPAR focal point will keep original CPARs and all attachments in separate files for each corporation in attachment 1. Each corporate file will contain separate files for divisions and subsidiaries. Each CPAR will be retained for 5 years, unless the program director or manager requests a longer retention period. For example, a long development program may necessitate longer retention to reflect contractor performance on the entire program. Distribution of CPARs within AFSC will only be made from one field activity CPAR focal point to another. Source selection team members must contact their local CPAR focal point for all appropriate CPARs. Figure 1 provides the list of AFSC CPAR focal points.

8. AFSC Source Selection Officers Report (RCS: SYS-PKC(A)0001). To keep the CPAR data base current and reflect the contractors that AFSC evaluates during source selection, an annual listing of officers is required. The listing must:

a. Reflect officers on concept demonstration and validation, full-scale development, or full-rate pro-

duction and deployment source selections over \$5 million (face-award value, including options) that were completed during the previous fiscal year.

b. State the name and address of the contractor division or subsidiary. Identify the parent corporation, if applicable. State number of times contractor submitted proposals.

c. Identify additional contractors recommended for inclusion in the data base, along with a brief justification.

d. Be submitted to HQ AFSC/PKC annually by 31 Oct.

9. CPAR Markings and Protection. All CPAR forms and attachments will be marked "For Official Use Only/Source Selection Sensitive." CPARs have the unique characteristic of always being predecisional in nature. They will always be source selection sensitive because they will be in constant use to support ongoing source selections. This predecisional nature of the CPAR is a basis for requiring that the CPAR data base be protected from unauthorized disclosure to personnel or entities outside the source selection process. It must be noted, however, that CPARs may also contain information that is proprietary to the contractor that is the subject of the report. Information contained on the CPAR such as trade secrets and confidential commercial or financial data, obtained from the contractor in confidence, must be protected from unauthorized disclosure. Additionally, CPARs may contain valuable government-generated commercial information that will be used in the award of government contracts. Such commercially valuable government-generated information must be protected from unauthorized disclosure. Based on the confidential nature of the CPAR, the following guidance applies to protection both internal and external to the government.

a. Internal Government Protection. CPARs must be treated as source selection sensitive at all times. The flow of CPARs throughout AFSC in support of source selections will be controlled by the CPAR focal points and transmitted only from one CPAR focal point to another (see AFR 70-15/AFSC Sup 1 and AFR 70-30/AFSC Sup 1). Outside of use in an instant source selection, information contained on the CPARs must be protected in the same manner as information contained in completed source selection files (see AFRs 70-15 and 70-30). Information contained on the CPAR may not be used to support preaward surveys, debarment proceedings, or any other internal government reviews.

b. External Government Protection. Due to the sensitive and confidential nature of the CPARs, disclosure of CPAR data to contractors or others outside the government is not authorized. An exception to this rule is for the contractor that is the subject of the CPAR. In this situation, access to review the completed CPAR will be granted by the CPAR focal point if the contractor personnel requesting access

have a letter signed by their corporate chief executive officer (CEO) or authorized designee (for example, general manager or division vice-president) granting disclosure to that individual. When the CEO has designated other corporate approval officials, both the CEO designation letter and CPAR access letter signed by the CEO designee must be presented to the CPAR focal point. Copies of the final CPAR are not allowed to be made or retained by the contractor's representative. Such limited and controlled access by the contractor's representative will not inhibit candid agency decisionmaking. This access is needed to ensure the accuracy of changes

OFFICIAL

DENIS R. NIBBELIN, Colonel, USAF
Director of Information Management

AFSCR 880-54 11 August 1988

made to the CPAR after the contractor's initial review. (Note: During the source selection discussion process, the contractor will be notified of relevant past performance data, derived from a CPAR or other sources, that require clarification or could lead to a negative rating. See AFR 70-15/AFSC Sup 1 and AFR 70-30/AFSC Sup 1.) On those rare occasions when a Freedom of Information Act (FOIA) request is received for CPAR release, process the request through FOIA channels to HQ AFSC/DAQDI for review and consideration by HQ AFSC/PK.

10. Form Prescribed, AFSC 125.

BERNARD P. RANDOLPH, General, USAF
Commander

2 Attachments

1. List of Contractors in CPAR Data Base
2. Instructions for Completing AFSC Form 125, Contractor Performance Assessment Report (CPAR)

AFSC--Andrews AFB DC 1988

LIST OF CONTRACTORS IN CPAR DATA BASE

1. Allegis Corporation (United Airlines Service Corp)*
2. Allied-Signal, Inc. (Bendix, The Garrett Corporation)
3. ALS Corp (Infotrac)
4. AMAF Industries, Inc.
5. Applied Science Association
6. Applied Technology (Litton Industries, Inc.)
7. Arvin Industries, Inc. (Calspan)
8. AUL Instruments
9. Aydin Corporation
10. Ball Corporation (VERAC, Inc.)
11. Bantle Memorial Institute
12. The Boeing Company
13. Brunswick Corporation
14. CFM International
15. Chrysler Corporation (Gulfstream Aerospace Corporation; Electrospace Systems, Inc.)
16. Cincinnati Electronics
17. Computer Sciences Corporation
18. Computing Devices Corporation
19. Cubic Corporation
20. Darling Industries, Inc.
21. DEC International, Inc.
22. Diab-Barracuda
23. Dynallectron Corporation
24. E-Systems, Inc.
25. Eaton Corporation
26. Educational Computer Corporation
27. Emerson Electric Company (Hazeltine Corporation)
28. Fairchild Industries, Inc.
29. Ford Motor Company (Ford Aerospace)
30. General Aero Production Corporation
31. General Dynamics Corporation
32. General Electric Corporation (RCA)
33. General Motors Corporation (Hughes, Allison Gas Turbine Division)
34. General Applied Sciences
35. GENCORP (Aerojet)
36. Grumman Corporation
37. GTE Corporation
38. Harris Corporation
39. Hercules, Inc.
40. Honeywell, Inc.
41. IBM
42. Interstate Electronic
43. ISCD Corporation
44. ITT Corporation
45. Kaman Sciences Corporation (Pikewood)
46. Lockheed Corporation (Sanders Associates)
47. Logicon, Inc.
48. Loral Corporation (Goodyear Aerospace)
49. The LTV Corporation
50. MANTECH
51. Martin Marietta Corporation
52. Marconi Avionics
53. McDonnell Douglas Corporation
54. Mission Research Corporation
55. Morton Thiokol, Inc.
56. Motorola, Inc.
57. M/A-COM, Inc.
58. North American Philips Corporation (Magnavox)
59. Northrop Corporation
60. Ordnance Corporation
61. The Penn Central Corporation (VITRO Corporation)
62. The Perkin-Elmer Corporation
63. Quest Research Corporation
64. Raytheon Company
65. Reflectone, Inc.
66. Rockwell International Corporation
67. Science Application International Corporation
68. The Singer Company
69. Softech
70. Teledyne, Inc.
71. Texas Instruments, Inc.
72. Texstar Plastics
73. Textron, Inc. (AVCO)
74. TRW Inc.
75. TVI Corporation
76. Unisys Corporation (Sperry)
77. United Industrial Corporation (AAI Corporation)
78. United Technologies Corporation (Pratt & Whitney)
79. Universal Tech International
80. Ver-val Enterprise, Inc.
81. Watkins-Johnson Company
82. Westinghouse Electric Corporation
83. Western Electric
84. Williams International Corp. (Williams Research)

*Major subsidiaries that currently have AFSC business are in parentheses. CPARs are required for all subsidiaries and divisions, not solely those in parentheses.

INSTRUCTIONS FOR COMPLETING AFSC FORM 125, CONTRACTOR PERFORMANCE ASSESSMENT REPORT (CPAR)

Type all information on the form. No handwritten CPARs will be accepted by the CPAR focal points for inclusion into the AFSC data base.

Item 1. State the name and address of the division or subsidiary of the contractor performing the contract. Identify the parent corporation (no address required.) Identify the contractor's Department of Defense Activity Address Directory code.

Items 2-6. Self-explanatory.

Item 7. State current contract period of performance, including any authorized extensions, such as options, that have been exercised.

Item 8. State the current percent of the contract that is complete. If cost performance report (CPR) or cost/schedule status report (C/SSR) data are available, calculate percent complete by dividing cumulative budgeted cost of work performed (BCWP) by contract budget base (CBB) (less management reserve) and multiplying by 100. CBB is the sum of negotiated cost plus estimated cost of authorized undefinitized work. If CPR or C/SSR data are not available, estimate percent complete by dividing the number of months elapsed by total number of months in contract period of performance and multiplying by 100.

Item 9. State the current face value of the contract. For incentive contracts, state the target value.

Item 10. Check the appropriate box.

Item 11. Identify the contract type. For mixed contracts, check the predominant contract type and identify the other type in "mixed."

Item 12. Provide a short descriptive narrative of the program. Spell out all abbreviations. Identify overall program phase and production lot (for example, concept development, full-scale development, low-rate initial production, or full-rate production (lot 2)). For major weapon systems, identify DODD 5000.1 milestones phases.

Item 13. Provide a short description of the contract effort that identifies key technologies, components, subsystems, and requirements. Describe the effort in enough detail to assist the source selection team members who will screen the CPAR to determine efforts that are relevant to their source selection. It is important to address the complexity of the contract effort and the overall technical risk associated with accomplishing the effort.

Item 14. In preparing a CPAR, the program director or manager should strive for consistency between

the ratings used for the areas of evaluation on the CPAR and the similar areas used for the PAR, CAR, program director assessment report (PDAR), or program manager assessment report (PMAR). The major difference is that the CPAR assesses a contractor's performance on an individual contract while the PAR, CAR, PDAR, and PMAR assess an overall program. A blue rating has been added to denote exceptional performance that is not found in the other assessments. This new rating is added because recognition of exceptional ability is important in the source selection process. Figure A2-1 lists and explains the evaluation colors.

a. Each area assessment must be based on objective data provided in item 16. Facts to support specific areas of evaluation should be obtained from government specialists familiar with the contractor's performance on the contract under review. Such specialists may, for example, be from engineering, contracting, contract administration, manufacturing, quality, and logistics.

b. The amount of risk inherent in the effort should be recognized as a significant factor and taken into account when assessing the contractor's performance. For example, if a contractor met an extremely tight schedule, a blue (exceptional) assessment may be given in recognition of the inherent schedule risk.

c. The CPAR is designed to assess prime contractor performance. However, in those evaluation areas in which subcontractor actions have significantly influenced the prime contractor's performance in a negative or positive way, record the subcontractor actions in item 16.

d. Many of the evaluation areas in item 14 represent groupings of diverse elements. The program director should consider each element and use the area rating to highlight significant issues. For example, product assurance (item 14d) could be rated marginal if quality was a problem even though other elements within the product assurance definition were satisfactory.

Item 14a. This item must be scored separately. Evaluate the extent to which the contractor is meeting overall product or system performance in terms of the contract requirements, including but not limited to the statement of work, specifications, contract data requirement lists, and significant special contract clauses.

Item 14a(1). Evaluate the contractor's engineering design capability and engineering resource support. Consider the amount and quality of engineering resources devoted to support the contract effort.

Item 14a(2). Evaluate the extent to which the contractor is meeting the software development, modifi-

Blue (Exceptional). Indicates performance clearly exceeds contractual requirements. The area of evaluation contains few minor problems for which corrective actions appear highly effective. For cost performance, blue indicates a positive cost variance.

Green (Satisfactory). Indicates performance clearly meets contractual requirements. The area of evaluation contains some minor problems for which corrective actions appear satisfactory. For cost performance, green indicates no cost variance or a negative cost variance greater than 0 but less than or equal to 5 percent.

Yellow (Marginal). Indicates performance meets contractual requirements. The area of evaluation contains a serious problem for which corrective actions have not yet been identified, appear only marginally effective, or have not been fully implemented. For cost performance, yellow indicates a negative cost variance greater than 5 percent but less than or equal to 15 percent.

Red (Unsatisfactory). Indicates the contractor is in danger of not being able to satisfy contractual requirements and recovery is not likely in a timely manner. The area of evaluation contains serious problems for which corrective actions appear ineffective. For cost performance, red indicates a negative cost variance greater than 15 percent.

Note 1. Upward or downward arrows may be used to indicate an improving or worsening trend insufficient to change the assessment status.

Note 2. N/A means not applicable.

Figure A2-1. Evaluation Colors.

cation, or maintenance contract requirements or a government-approved software development plan. Consider the amount and quality of software development resources devoted to support the contract effort.

Item 14b. Evaluate the contractor's adherence to the contract schedule. Identify in item 16 the major milestones, deliverable items, or significant data items that contribute to the schedule evaluation. The short narrative explanation in item 16 should address significance of items, discuss causes, and evaluate effectiveness of contractor corrective actions. If CPR or C/SSR data are available and the schedule variance exceeds 15 percent (positive or negative),

briefly discuss in item 16 the significance of this variance for the contract effort. Cumulative schedule variance in dollars is defined as budgeted cost of work performed (BCWP) minus budgeted cost of work scheduled (BCWS). Percent schedule variance is defined as $((BCWP - BCWS)/BCWS) \times 100$.

Item 14c. If CPR or C/SSR data are available, evaluate current cost variance if the contract is greater than 10 percent complete. Put the current percent variance and the government estimate at completion in item 15 and give a short narrative explanation of causes and contractor-proposed solutions in item 16. See item 8 to calculate percent complete. Compute current cost variance percentage by dividing cumulative cost variance to date (column 11 of the CPR, column 6 of the C/SSR) by cumulative BCWP and multiplying by 100. Compute completion cost variance percentage by dividing CBB less the government's estimate at completion (EAC) by CBB and multiplying by 100. The calculation is $((CBB - EAC)/CBB) \times 100$. The CBB must be the current budget base against which the contractor is performing (including formally established overtarget baselines (OTB)). If an OTB has been established since the last CPAR, a brief description in item 16 of the nature and magnitude of the baseline adjustment must be provided. Subsequent CPARs must evaluate cost performance in terms of the revised baseline and reference the CPAR that described the baseline adjustment (for example: "The contract baseline was formally adjusted on (date). See CPAR for (period covered by CPAR) for an explanation.") If CPR or C/SSR data are not available, evaluate contractor cost management. Is the contractor experiencing cost growth or underrun? Provide a short narrative explanation in item 16 of causes and the contractor's proposed solutions.

Item 14d. Product assurance is the collection of disciplines needed to design, test, and manufacture systems or equipment meeting specified requirements and suitable for intended use. The product assurance assessment evaluates adequacy of contractor organization, resources planning, design, manufacturing, and test actions to meet system or equipment reliability, maintainability cost, and quality requirements with minimum risk.

Item 14e. Evaluate the adequacy of the contractor's performance in planning, supporting, conducting, and assessing the in-house and independent test and evaluation programs.

Item 14f. Evaluate the adequacy of the contractor's performance in accomplishing integrated logistics support (ILS) program tasks and in performing logistics support analysis activities. The nine ILS element groupings are maintenance planning; manpower and personnel; supply support; support

equipment, technical data, training and support, computer resources support, facilities, packaging, handling, storage, and transportation; and design interface.

Item 14g. Evaluate the adequacy of the contractor's responsiveness. Address such issues as the timeliness and quality of problem identification, corrective action plans, and proposal submittals.

Item 14h. Evaluate the contractor's effort devoted to managing subcontracts. Consider efforts taken to ensure early identification of subcontract problems and the timely application of corporate resources to preclude subcontract problems from impacting overall prime contract performance.

Item 14i. Specify any additional evaluation areas that are unique to the contract. If the contract contains an award fee, enter "award fee" in the item and list all the award fee percentages earned during the evaluation period under N/A.

Item 15. If CPR or C/SSR data are available, identify the cumulative cost variance to date (percent); the government's cost estimate at completion (percent); and the cumulative schedule variance (percent). See item 14c and 14b for calculations.

Item 16. A short, factual narrative statement is required for all assessments, regardless of color rat-

ing. Cross-reference the comments in item 16 to rated evaluation areas in item 14. Each narrative statement in support of the area assessment must contain objective data. An exceptional cost performance assessment could, for example, cite the current underrun dollar value and estimate at completion. A marginal engineering design/support assessment could, for example, be supported by information concerning personnel changes. Key engineers familiar with the effort may have been replaced by less experienced engineers. Sources of data include Air Force Operational Test and Evaluation Center operational test and evaluation results; technical interchange meetings; production readiness reviews; earned contract incentives; and award fee evaluations.

Item 17. This is signed after contractor review and just prior to sending it to the product division review official.

Item 18. See paragraph 6c in the regulation for guidance on sending the CPAR to the contractor for review and comment.

Item 19. Self-explanatory.

Item 20. The reviewing official must be at least one level above the program director or manager. This official will be designated by local procedures.

Item 21. Self-explanatory.

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SUBJ: INTERIM MESSAGE CHANGE (IMC) 90-1 TO AFSCR 800-54, 11 AUG 88.

1. THIS IMC MODIFIES AFSC POLICY ON REVIEW AND SIGNATURE OF THE CPAR BY THE REVIEW OFFICIAL. THIS CHANGE IS EFFECTIVE IMMEDIATELY AND WILL BE INCORPORATED INTO THE UPCOMING REVISION TO AFSCR 800-54. AND WILL REMAIN EFFECTIVE AS PUBLISHED THEREIN.

2. PAGE 2, REPLACE PARAGRAPH 6-E., IN ITS ENTIRETY, WITH: AFTER RECEIVING CONTRACTOR COMMENTS OR 30 DAYS FROM THE DATE OF THE TRANSMITTAL LETTER TO THE CONTRACTOR, WHICHEVER OCCURS FIRST, THE PROGRAM DIRECTOR OR MANAGER WILL SIGN ITEM 17 AND SEND THE CPAR TO THE REVIEW OFFICIAL FOR REVIEW AND SIGNATURE ACCORDING TO LOCAL PROCEDURES. THE REVIEW OFFICIAL MUST BE AT LEAST ONE LEVEL ABOVE THE PROGRAM MANAGER OR DIRECTOR, AND MUST BE A GENERAL OFFICER, A MEMBER OF THE SENIOR EXECUTIVE SERVICE, OR THE ACTIVITY COMMANDER OR VICE COMMANDER. FOR MAJOR PROGRAMS, THE PROGRAM EXECUTIVE OFFICER

SHALL BE GIVEN THE OPTION OF ACTING AS THE REVIEW OFFICIAL.

3. PAGE 8, REPLACE ITEM 20, IN ITS ENTIRETY, WITH: THE REVIEW OFFICIAL SHALL MEET THE QUALIFICATIONS DESCRIBED IN PARAGRAPH 6-E.



ROBERT W. DREWES
Brigadier General, USAF
DCS/Contracting

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DISTRIBUTION TO ALL
HOLDERS OF BASIC DOCUMENT

| CONTRACTOR PERFORMANCE ASSESSMENT REPORT (CPAR) | | | | | | | |
|--|--|--|--|----------------------------|--|--------|--|
| 1 NAME ADDRESS OF CONTRACTOR (Overall) | | 2 <input type="checkbox"/> INITIAL <input type="checkbox"/> INTERMEDIATE <input type="checkbox"/> FINAL REPORT | | 3 PERIOD COVERED BY REPORT | | | |
| 4 CONTRACT NUMBER | | 5 PRODUCT DIVISION | | | | | |
| 6 LOCATION OF CONTRACT PERFORMANCE (if not in item 1) | | 7 CONTRACT PERIOD OF PERFORMANCE | | | | | |
| 8 CURRENT CONTRACT DOLLAR VALUE | | 9 CONTRACT PERCENT COMPLETE | | | | | |
| 10 <input type="checkbox"/> COMPETITIVE <input type="checkbox"/> FOLLOW ON <input type="checkbox"/> NONCOMPETITIVE | | 11 CONTRACT TYPE | | | | | |
| 12 PROGRAM TITLE AND PHASE OF ACQUISITION | | 13 CONTRACT EFFORT DESCRIPTION (highlight key components, technologies and requirements) | | | | | |
| 14 EVALUATE THE FOLLOWING AREAS | | PAST COLOR | | RED | | YELLOW | |
| a. PRODUCT/SYSTEM PERFORMANCE (Overall) | | | | | | | |
| 1) ENGINEERING DESIGN/SUPPORT | | | | | | | |
| 2) SOFTWARE DEVELOPMENT | | | | | | | |
| 3) SCHEDULE | | | | | | | |
| 4) COST PERFORMANCE | | | | | | | |
| 5) PRODUCT ASSURANCE | | | | | | | |
| 6) TEST AND EVALUATION | | | | | | | |
| 7) ILS PROGRAM | | | | | | | |
| 8) MANAGEMENT RESPONSIVENESS | | | | | | | |
| 9) SUBCONTRACT MANAGEMENT | | | | | | | |
| OTHER (Specify) | | | | | | | |
| VARIANCE | | | | | | | |
| COST VARIANCE (%) | | | | | | | |
| SCHEDULE VARIANCE (%) | | | | | | | |
| | | | | | | | |

APBC Form 128, MAY 88

FOR OFFICIAL USE ONLY - SOURCE SELECTION SENSITIVE (When Filled In)

| | | | |
|---|--|------------------|----------------------|
| 6 PROGRAM DIRECTOR/ MANAGER NARRATIVE | | | |
| 7 TYPED NAME AND TITLE OF PROGRAM DIRECTOR/ MANAGER | | SIGNATURE | OFFICE SYMBOL |
| | | | DATE |
| | | TELEPHONE | |
| 8 CONTRACTOR COMMENTS (Contractor's option) | | | |
| 19 TYPED NAME AND TITLE OF CONTRACTOR REPRESENTATIVE | | SIGNATURE | DATE |
| | | | TELEPHONE |
| 20 REVIEW BY PRODUCT DIVISION REVIEWING OFFICIAL (Comments optional) | | | |
| 21 TYPED NAME AND TITLE OF PROD DIV REVIEWING OFFICIAL | | SIGNATURE | OFFICE SYMBOL |
| | | | DATE |
| | | TELEPHONE | |

APSC FORM 128 (Revised MAY 88)

FOR OFFICIAL USE ONLY - SOURCE SELECTION SENSITIVE (When Filled In)

DEPARTMENT OF DEFENSE

Department of the Air Force

48 CFR Ch. 53

Air Force Logistics Command Federal Acquisition Regulation Supplement: Special Contracting Methods, Vendor Rating System

AGENCY: Department of the Air Force, DOD.

ACTION: Proposed rule.

SUMMARY: The Air Force proposes to amend chapter 53 of title 48 of the Code of Federal Regulations by adding the Air Force Logistics Command (AFLC) Federal Acquisition Regulation as Appendix A, consisting of parts AFLC 5317 and AFLC 5352. AFLC is developing the Vendor Rating System (VRS) for use as an objective contractor performance evaluating, rating, and ranking system. The intended effect is to assist AFLC contracting officers in determining which competitive offer represents the greatest value to the Government by providing each offer's historical performance on AFLC contracts in terms of rating in quality and delivery. The procedure will facilitate awards to contractors who have delivered quality supplies within specified times under AFLC contracts. VRS provides for a ranking of the offers under a solicitation considering the evaluated offer amount and the VRS ratings.

DATES: Comments must be submitted on or before November 23, 1990.

FOR FURTHER INFORMATION CONTACT: S. Wiginton, AFLC/PMPL, Wright-Patterson AFB OH 45433-5001.

SUPPLEMENTARY INFORMATION

A. Background

AFLC/VRS is intended to implement in part the "DOD Action Plan to improve the Quality of Spare and Repair Parts through Reductions in Contractor Nonconformances." The DOD Action Plan presents 28 objectives for improving the quality of spare parts. The AFLC VRS implements Objective Number 4, which is to encourage the use of quality factors in the source selection process for spare and repair parts by centralizing, automating, collecting, and sharing contractor performance information and by maximizing the use of existing sources of contractor performance information to improve acquisition processes, purge defective material and improve the quality of DOD spare and repair parts.

The VRS will be initiated within AFLC by a 10-month test period at three of the five air logistics centers. Adjustments or revisions to the policy and provision resulting from test period data will be incorporated before AFLC-wide implementation.

B. Regulatory Flexibility Act

This procedure may have a significant impact on a substantial number of small entities. Therefore, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and will be sent to the Chief Counsel for Advocacy of Small Business Administration. A copy of the IRFA may be obtained from AFLC/PMPL, ATTN: S. Wiginton, Wright-Patterson AFB OH 45433-5001.

C. Paperwork Reduction Act

This rule does not contain information collection requirements which require the approval of OMB under the criteria of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

List of Subjects in 48 CFR Chapter 53

Government procurement.

Therefore, it is proposed to amend title 48 of the Code of Federal Regulations chapter 53 by adding Appendix A to include part AFLC 5317 and part AFLC 5352 to read as follows:

Appendix A to Chapter 53—Air Force Logistics Command Federal Acquisition Regulation Supplement

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART AFLC 5317—SPECIAL CONTRACTING METHODS

SUBCHAPTER H—CLAUSES AND FORMS

PART AFLC 5352—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

Part AFLC 5317—Special Contracting Methods

Subpart AFLC 5317.91—Vendor Rating System

Sec.
AFLC 5317.9100 Scope of subpart.
AFLC 5317.9101 Definitions.
AFLC 5317.9102 Policy.
AFLC 5317.9103-1 Uses.
AFLC 5317.9103-2 Objectives.
AFLC 5317.9103-3 Responsibilities.
AFLC 5317.9103-4 Procedures.
AFLC 5317.9103-5 Data sources.
AFLC 5317.9103-6 Performance standards.
AFLC 5317.9103-7 Evaluation.
AFLC 5317.9103-8 Responsibility determination.
AFLC 5317.9103-9 Approvals.
AFLC 5317.9103-10 Reporting.
AFLC 5317.9103-11 Solicitation provision.
Authority: 5 U.S.C. 301 and FAR 1.301.

Subpart AFLC 5317.91—Vendor Rating System

AFLC 5317.9100 Scope of subpart.

This subpart prescribes policies and procedures for the AFLC contractor performance evaluation system identified as the Vendor Rating System (VRS). VRS is a contractor performance evaluation, rating, and ranking system. It is designed to assist the contracting officer in determining the awardee whose offer represents the greatest value to the Government in accordance with stated criteria.

AFLC 5317.9101 Definitions.

The following terms and definitions apply to VRS and this subpart:

(a) *Computed offer.* An initial offer under a solicitation plus all evaluation costs identified in the solicitation, e.g., First Article, transportation, and/or other costs. The computed offer will be calculated by unit or total amount depending on whether the Government requirement and the evaluation costs are established as unit or total quantity amounts.

(b) *Delivery rate (DR).* A computation of the 12-month delivery performance history of a contractor using the number

(c) **Contract schedule deliveries.** Contracted after the due date because of contractor-caused reasons, compared to the number of schedules completed during the same period by that contractor. The computation will be carried to the fourth decimal place.

(d) **Greatest value.** The most value to the Government considering price, quality, delivery, and other factors. It is a determination of the contracting officer based on consideration of factors impacting a Government requirement. Considerations may be, but are not limited to, an offeror's quality and delivery performance history, evaluated once, complexity of the item(s), and time to delivery versus need.

(e) **Quality rate (QR).** A computation of the 12-month quality performance history of a contractor using the count of contractor-caused units reported defective under quality deficiency reports (QDRs) compared to the number of units delivered for the same period by that contractor. The computation will be carried to the fourth decimal place.

(f) **Ranking.** The order of all responsive offerors to a solicitation, considering stated VRS factors and the unquoted offer amount, from the highest to the lowest with the highest ranked first in order.

(g) **VRS competitive range.** Those offerors on a solicitation whose quality and delivery performance histories result in a minimum rating of 96 in quality and 85 in delivery elements and whose price offers are within 15 percent of the lowest price offer. The low offeror will not be in the VRS competitive range unless performance history meets the minimum ratings. The competitive range may be otherwise established with the approval two levels above the contracting officer.

AFLC 5317.9102 Policy.

AFLC 5317.9102-1 Uses.

(a) VRS shall apply to all AFLC air logistics center (ALC) competitively negotiated, National Stock Number (NSN) identified, spare part acquisitions estimated to exceed \$10,000 in total value. These evaluations will be processed through the VRS database/software application.

(b) The VRS:

(1) Provides data to analyze a contractor's historical quality and delivery performance by Federal Stock Class (FSC) and total business with AFLC ALC central contracting activities and

(2) Provides quality and delivery performance information on those contractors by FSC and total business

with the ALC central contracting activities.

AFLC 5317.9102-2 Objectives.

(a) The primary objective of VRS is to provide the contracting officer with a procedure for making an award based on the greatest value to the Air Force. Management information and contract status tracking systems are merged into an evaluation procedure using quality and delivery performance historical data on all AFLC ALC contractors.

(b) An expected benefit from VRS is contractor improvements in performance on AFLC contracts and enhancement of AFLC's ability to acquire quality supplies on time from proven producers.

(c) Improvements in quality and delivery performance will decrease administrative costs of processing unacceptable material and the contract administration actions required on delinquent contract items and enhance the quality of the material.

AFLC 5317.9102-3 Responsibilities.

(a) HQ AFLC/PM&MT, Wright-Patterson AFB OH, is responsible for maintenance of records to support the decision making process leading to command-wide implementation including the rationale for systems applications and computations.

(b) HQ AFLC/PM&PL, Wright-Patterson AFB OH, is responsible for issuance of policy and AFLC-wide implementation.

(c) HQ AFLC/PM&QL (HQ-AFLC/PM&QL), Hill AFB UT, is responsible for providing the Automated Contract Preparation System (ACPS) data feed to VRS.

(d) SM-AFLC/PM&XD, McClellan AFB CA, is responsible for design, management, and maintenance of the VRS database and applications programs to extract data from J041/G021/ACPS for VRS, and queries required to obtain data from the VRS data base.

AFLC 5317.9103 Procedures.

AFLC 5317.9103-1 Data sources.

(a) The QR is computed using a contractor's data from G021, or its successor system, and the INFOCEN network for QDR data and the J041 system for the number of units delivered.

(b) The DR is computed using a contractor's data from J041 for delivery schedules completed on time and delinquent.

(c) The QR and DR are computed for a contractor's Contract and Government Entity (CAGE) code by each FSC and total business with AFLC. The

applicable rates will be provided with the ACPS abstract.

AFLC 5317.9103-2 Performance standards.

(a) The VRS standards and rating symbols for historical quality and delivery performance are:

(1) Exceptional (E)—Exceeds AFLC target performance range. A rating for QR: 99.0000 or higher. A rating for DR: 95.0000 or higher.

(2) Acceptable (A)—Meets AFLC target performance range. A rating for QR: 98.9999 to 98.0000. A rating for DR: 94.9999 to 85.0000.

(3) Marginal (M)—Does not meet AFLC acceptable performance range but may receive award when a higher rated offeror is not responsive to the solicitation, exceeds the competitive range criteria, or is determined unacceptable for some other reason. A rating for QR: 97.9999 to 97.0000. A rating for DR: 84.9999 to 75.0000 and

(4) Unacceptable (U)—Fails to meet marginal rating and should not be considered for an award. A rating for QR: Less than 97. A rating for DR: Less than 75.

(b) Data for the quality and delivery performance rates will be updated on a monthly basis. The update will be data from the previous month and effective on the tenth working day of the following month.

(c) Performance history ratings will be provided for each contractor by individual FSC and total of all FSCs.

(d) An offeror with performance history in the FSC of the item(s) on the solicitation will be evaluated using that offeror's quality and delivery performance history rating in that FSC.

(e) An offeror with no AFLC performance history in the FSC of the item(s) on the solicitation will be evaluated using that offeror's AFLC total quality and delivery performance history rating in all other FSCs.

(f) An offeror with performance history only in quality performance will be evaluated using that rate and the delivery performance will be evaluated as acceptable with zeros (00.0000) assigned for the DR. A limited preaward survey, as a minimum, should be performed for the delivery element. Full documentation of an affirmative determination of contractor responsibility specifically addressing delivery performance is required before award.

(g) An offeror with no AFLC performance history in any FSC will be evaluated as acceptable with zeros (00.0000) assigned for QR and DR for evaluation. A preaward survey should

be performed. File documentation of an affirmative determination of contractor responsibility is required before award.

(h) HQ AFLC/PM and ALC/PM personnel will have overnight query access to VRS information. Information to be provided to other Government agencies or Air Force offices will only be released in writing by a Director or Deputy Director in the office of the HQ AFLC/PM, or higher level, at HQ AFLC or a division chief or deputy division chief, or higher level, at an ALC. All released data must carry the restrictive legend: "CONFIDENTIAL CONTRACTOR INFORMATION—FOR OFFICIAL USE ONLY." All other releases of VRS information must have prior coordination of the local Staff Judge Advocate.

(i) A data retrieval and storage program, the VRS Data Base History (DBH), will be maintained by SM-ALC/PMXND. The data base will be accessed by the ALCs for responding to management and contractor queries and protest documentation. The DBH storage and retention period is 24 months. The retrieval query will provide for overnight response with printout. All printouts will carry

AFLC 5317.9103-3 Evaluation.

(a) The ACPS abstract function will, after completion of all other evaluations established by the solicitation (e.g., Balance of Payments, Quantity Discount, transportation costs, and Multiple Awards), convert the offers for each solicitation item into computed offers and provide the amounts on the abstract.

(b) The VRS spreadsheet will be provided with the abstract as a separate document.

(1) The spreadsheet will list CAGE, computed offer, QR and standard rating symbol, DR and standard rating symbol, and rank each offeror for each separately evaluated item. Offers will be ranked in order of their standard rating and then their computed offer amount.

(i) Three contractors, all rated exceptional in QR and DR, would be ranked in order of their computed offer from the lowest to the highest.

(ii) Three contractors, given a mix of ratings, will be ranked by order of the rating symbols (E/E, E/A, A/A, E/M, A/M, M/M, E/U, A/U, M/U, and U/U).

(2) Items involving subtitle items, including attachments and exhibits, will be evaluated as one item using total subtitle items and quantities for the item.

(3) Provide the standard rating symbol (E, A, M, or U) for quality and delivery for each offeror.

(4) The spreadsheet will be annotated as "RESTRICTED EVALUATION DATA—CONTRACTING OFFICER DELIBERATION DOCUMENT."

(5) The contractor performance data on the spreadsheet will be considered confidential contractor information and given appropriate protection.

(c) Only offerors rated exceptional or acceptable in quality and delivery performance will be considered in the VRS competitive range and further evaluated for award. A minimum of two offers rated exceptional or acceptable is required for the competitive range to be established under VRS by the ACPS process.

(d) The contracting officer may make a greatest value award based on, but not limited to, one of the following selection criteria:

(1) The low computed offer with VRS symbol of exceptional.

(2) The computed offer of an AFLC Blue Ribbon Program contractor in the FSC of the solicited item(s) which is within ten percent of the low computed offer.

(3) The computed offer, not from an AFLC Blue Ribbon Program contractor, of an offeror coded exceptional in both areas which is within ten percent of the low computed offer.

(e) The rate differences may be considered in making the award decision when more than one offeror receives the same symbols or symbol combination.

(f) The basis for the award decision will be documented in the contract file.

(g) Each offeror not in the competitive range will be notified when the determination is made. ACPS will provide notice letters to the offerors determined outside the competitive range for contracting officer signature and transmittal. The letters will be provided with the abstract and VRS spreadsheet.

(h) If the criteria in AFLC 5317.9102-2(c) are not met, the ACPS will not generate the notice letters.

(i) If the offer selected for award is not the lowest-priced responsive and responsible offer, the contracting officer shall conduct written or oral discussions as prescribed at FAR 15.610, "Written or Oral Discussions," and solicit best and final offers as prescribed at FAR 15.611, "Best and Final Offers." As a minimum for solicitations under VRS, the technical deficiencies to be addressed to the offerors in the competitive range will be their individual QR and DR.

AFLC 5317.9103-4 Responsibility determination.

(a) VRS establishes performance standards to determine a competitive

range based on historical performance. It neither negates the requirement for an affirmative determination of contractor responsibility, determines a contractor ineligible for award, nor makes any other negative determination of contractor responsibility. The rating system may provide an indication of a contractor's responsibility by comparing the quality and delivery rates for historical performance. It does not reflect the most current data available on a contractor.

(b) The Automated Contractor Responsibility Review Program (ACRRP) review is not negated by this system. Regardless of the awardee, an affirmative determination of responsibility is required since the VRS ratings are computed using data recorded through the previous month and the rates apply through the following month. ACRRP review is required to obtain current information prior to making an award. Current delinquency rate, notification of issuance of Method C or D letters, results of recent preaward surveys, or notices of potential problem areas from various sources should be considered.

AFLC 5317.9103-5 Approvals.

(a) Division level approval in writing is required prior to:

(1) Issuing a competitive, negotiated solicitation for NSN identified items and estimated to exceed \$10,000 when VRS will not be used; or

(2) Awarding a contract to any offeror with a marginal or unacceptable rating in the quality or delivery element.

(b) The following prior approval levels apply when the award is not to be made to the lowest price offeror:

(1) Chief of the contracting branch when the difference between the low price offer and the award price exceeds \$50,000 up to \$150,000.

(2) Chief or Deputy Chief of the contracting division when the difference between the low price offer and award price exceeds \$150,000 up to \$250,000.

(3) Director or Deputy Director of the contracting office when the difference between the low price offer and award price exceeds \$250,000 up to \$500,000.

(4) Commander or Vice Commander, Air Logistics Center, when the difference between the low price offer and the award price is \$500,000 or more.

AFLC 5317.9103-6 Reporting.

The following data will be accumulated in the VRS automated system:

(a) Number of competitive awards exceeding \$10,000 which did not use the VRS and the reason(s).

(b) Number of competitive awards over \$25,000 which did not use the VRS and the reason(s).

(c) Number of awards using VRS including:

(1) Number of awards and total dollars to the highest ranked offeror;
(2) Number of awards, total dollars, and dollar amount of premium price to exceptional ranked offerors who were and were not the low price offeror;
(3) Number of awards, total dollars, and dollar amount of premium price to a combination of exceptional and acceptable rated offerors who were and were not the low price offeror. Breakout between exceptional and acceptable standard ratings in quality and delivery performance;

(4) Number of awards, total dollars, and dollar amount of premium price to acceptable rated offerors who were and were not the low price offeror;

(5) Number of awards, total dollars, and dollar amount of premium price to a combination of acceptable and marginal rated offerors who were and were not the low price offeror. Breakout between acceptable and marginal standard ratings in the quality and delivery performance;

(6) Number of awards, total dollars, and dollar amount of premium price to marginal rated offerors who were and were not the low price offeror;

(7) Number of awards, total dollars, and dollar amount of premium price to a combination of marginal and unacceptable rated offerors who were and were not the low price offeror. Breakout between marginal and unacceptable standard ratings in the quality and delivery performance;

(8) Number of awards, total dollars, and dollar amount of premium price to unacceptable rated offerors who were and were not the low price offeror;

(9) Number of awards, total dollars, and dollar amount of premium price to other rating combinations. Breakout by standard rating combinations and performance areas; and

(10) Total number of awards and dollars.

(d) Listing or tracking system which identifies the contract number and NSN

for VRS awards. This listing will be retained for 24 months.

AFLC 5317.9103-7 Solicitation provision.

The contracting officer shall insert the provision at AFLC 5352.217-9031, Vendor Rating System (VRS) in Section I. of all solicitations for acquisitions meeting the criteria of AFLC 5317.9102-3(a).

SUBCHAPTER H—CLAUSES AND FORMS

PART 5352—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Authority: 5 U.S.C. 301 and FAR 1.301

Support 5352.2—Texts of Provisions and Clauses

AFLC 5352.217-9031 Vendor Rating System.

As prescribed at AFLC 5317.9103-7, insert the following provision:

AFLC Vendor Rating System (VRS) (XXX 1991)

(a) Award of this contract will be made using the Air Force Logistics Command (AFLC) Vendor Rating System (VRS) procedure. VRS is a contractor performance evaluation system which provides each offeror a historical quality and delivery performance data by Federal Stock Class (FSC) and total business with AFLC central contracting activities. Data will be used to assist the contracting officer in evaluating offers to determine the VRS competitive range and which award will be of greatest value to the Government.

(b) Responsive offerors with quality or delivery performance history rated "Exceptional" or "Acceptable" and within 15 percent of the low evaluated price will be considered in the VRS competitive range. The VRS performance standards are:

(1) Exceptional: AFLC performance history files computing a quality rate of 99.0000 or higher and a schedule-completed-ontime rate of 95.0000 or higher.

(2) Acceptable: AFLC performance history files computing a quality rate of 98.9999 to 99.0000 and a schedule-completed-ontime rate of 94.9999 to 95.0000.

(3) Offerors with no performance history with AFLC will be rated "Acceptable" and assigned rates of 00.0000.

(4) The rate is an arithmetical computation based on the following:

(Offeror's score rating of experience with AFLC is the total FSC, not the specific items, of the evaluated items.)
(c) If the offeror has no AFLC history, with the solicited FSC, the offeror's score rating of experience with AFLC is another FSC's.

Each separate award will be evaluated.

(d) Offers from contractors who are not rated "Exceptional" or "Acceptable" may be considered for award if the VRS competitive range determination does not permit an award decision by the contracting officer.

(e) The Government will award under this solicitation to the responsive offeror whose offer is determined to have the greatest value to the Government, provided other factors considered. The determination will be based on consideration of performance history, evaluated price, and time to delivery versus need of best effort delivery is a part of the solicitation. And final specific evaluation factors may be identified in other provisions of the solicitation.

Note: The following information will be used in paragraph (f) for award decisions: (1) The provisions. The award will be based on the test period and the AFLC command will be implemented will depend on the status of legislation and final decisions regarding the award of negotiated contracts without discussion. Current (C)AO provisions do not permit award without discussions. Option (f) when award is to other than the low price offeror. Comments regarding both options are requested.)

Option 1 for Paragraph (f)

(f) Award without discussion. The Government may accept other than the lowest offer and award on the basis of initial offers received without discussions.

(End of Provision)

Option 2 for Paragraph (f)

(f) Award with discussion. If the offer selected for award is not the lowest price responsive and responsible offer, written or oral discussions and solicitation of best and final offers will be conducted. As a minimum, the technical deficiencies to be addressed to the offerors in the competitive range will be their individual VRS quality and delivery rates followed by a request for best and final offers.

(End of Provision)

Patsy J. Conner,

Air Force Federal Register Liaison Officer
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PART 206H—RELEASE OF ACQUISITION-RELATED INFORMATION

Sec.
206h.1 Purpose.
206h.2 Applicability and scope.
206h.3 Policy.
206h.4 Responsibilities.
Authority: Public Law 101-188.

§ 206h.1 Purpose.

This part sets forth Department of Defense (DoD) policy for the release of acquisition-related information.

§ 206h.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman, Joint Chiefs of Staff and Joint Staff (CJCS), the Unified and Specified Commands, and the Defense Agencies (hereafter referred to collectively as "DoD Components").

(b) This part is issued pursuant to section 822 of Public Law 101-188, which requires the Department of Defense to prescribe a single uniform regulation for dissemination of, and access to, acquisition information.

§ 206h.3 Policy.

(a) *General.* It is the Department of Defense's policy to make the maximum amount of acquisition-related information available to the public, and to respond promptly to specific requests from the public for such information, except for the information identified in paragraph (b) of this section, for which release is restricted.

(b) *Information for Which Release is Restricted.* The information identified below may be released only as set forth herein.

(1) *Release Subject to Statutory Restrictions.* This information may be released only in accordance with the applicable statutory requirements. Once the statutory requirements have been satisfied, the information may be

released unless it falls within one of the categories described in the following paragraphs, in which case the policies governing release of information within those categories shall be followed:

(2) *Classified Information.* (i) Any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or under the control of the United States Government, and which, for national security purposes, must be protected against unauthorized disclosure and is so designated or marked with the appropriate classification.

(ii) Release, access, and dissemination of classified information shall be made through existing security channels in accordance with DoD 5220.22-R, DoD 5220.22-M, and DoD 5200.1-R, which are implementing publications for safeguarding classified information release, access, and dissemination to United States and foreign concerns.

(3) *Contractor Bid or Proposal Information.* (i) This is information prepared by or on behalf of an offeror and submitted to the Government as a part of or in support of the offeror's bid or proposal to enter into a contract with the Government, the disclosure of which would place the offeror at a competitive disadvantage or jeopardize the integrity or the successful completion of the procurement. Contractor bid or proposal information includes cost or pricing data, profit data, overhead and direct labor rates, and manufacturing processes and techniques. Contractor bid or proposal information does not include information that is available to the public.

(ii) (A) *Sealed Bids.* (1) Prior to bid opening, no release or disclosure of contractor bid information shall be made to anyone other than those who are involved in the evaluation of the bids or to other individuals authorized by the Head of the DoD Component, or his or her designee.

(2) After contract award, contractor bid information may be released or disclosed by those authorized by the Head of the DoD Component, or his or her designee, to make such release or disclosure, if the information to be released or disclosed is not subject to a restrictive legend authorized by Federal Acquisition Regulation (FAR) 52.215-12 or release is not otherwise restricted by law.

¹ Copies may be obtained, at cost, from the National Technical Information Service, 535 Port Royal Road, Springfield, VA 22161.

² Copies may be obtained, at cost, from the Government Printing Office, ATTN: Superintendent of Documents, Washington, DC 20540.

³ See footnote 1 to § 206h.3b(2)(1).

(J) *Negotiated Procurement.* Prior to contract award, no release or disclosure of contractor proposal information shall be made to anyone other than those who are involved in the evaluation of the proposals or the source selection or to other individuals authorized by the Head of the DoD Component, or his or her designee. DoD Components shall adapt procedures in accordance with FAR 15.413 to protect against release or disclosure of contractor proposal information. After contract award, contractor proposal information may be released or disclosed by those authorized by the Head of the DoD Component, or his or her designee, to make such release or disclosure, if the information to be released or disclosed is not subject to a restrictive legend authorized by FAR 15.509 or FAR 52.215-12 or release is not otherwise restricted by law.

(4) *Source Selection Information.* (i) This is information prepared or developed for use by the Government in connection with the selection of a bid or proposal for the award of a contract. Only the following information, including copies or extracts thereof, is source selection information:

- (A) Bid prices submitted in response to a Government solicitation for sealed bids or lists of such bid prices (applicable prior to bid opening only);
- (B) Proposed costs or prices submitted in response to a Government solicitation prior to award of the contract, a list of proposed costs or prices;
- (C) Source selection plans;
- (D) Technical evaluation plans;
- (E) Technical evaluations of competing proposals;
- (F) Cost or price evaluations of competing proposals;
- (G) Competitive range determinations;
- (H) Rankings of competitors;
- (I) The reports and evaluations or source selection boards, advisory councils, or the source selection authority (SSA); and
- (J) Any other information which:
 - (1) If disclosed, would give an offeror a competitive advantage or jeopardize the integrity or successful completion of the procurement; and
 - (2) Is marked with the legend "Source Selection Information."

(ii) *Release of or Access to Source Selection Information (SSI).—(A) Access to SSI.* The SSA (including the contracting officer when the contracting officer is the SSA) shall restrict access to source selection information to only those Government employees directly involved in the source selection process or to those individuals who have been authorized by the Head of the DoD Component, or his or her designee, to

have access to such information. If the contracting officer or the SSA have not been appointed, the Head of the DoD Component, or his or her designee, shall assure access to such information is properly restricted. Employees supervising or managing employees directly involved in the source selection process are not themselves by virtue of their positions directly involved in the source selection process.

(B) *Release of SSI.—(1) Prior to Contract Award.* Source selection information shall not be released prior to contract award unless the Head of the DoD Component, or his or her designee, determines that release is in the public interest and would not jeopardize the integrity or successful completion of the procurement. The information to be released shall only be released by the contracting officer. The contracting officer shall make release in a manner that does not provide any potential offeror with a competitive advantage.

(2) *After Contract Award.* The need to protect source selection information generally ends with contract award. The contracting officer may release, or authorize the release of, any source selection information related to that contract award except: Source selection information specifically developed or prepared for use with more than one solicitation when there is a continuing need to protect that information; unless otherwise permitted by law, source selection information containing contractor data or extracts thereof which are protected by law; information which would reveal the relative merits or technical standing of the competitors or the evaluation scoring; and any pre-decisional or other information not subject to release under the Freedom of Information Act. Debriefings to unsuccessful offerors shall be conducted in accordance with FAR 15.1003 and Defense Federal Acquisition Regulation Supplement (DFARS) 215.1003(a).

(5) *Planning, Programming, and Budgetary Information.* (i) *Planning, Programming, and Budgeting System (PPBS)* documents and supporting data bases are not to be disclosed outside the Department of Defense (DoD) and other governmental agencies directly involved in the defense planning and resource allocation process (e.g., the Office of Management and Budget). PPBS papers and associated data set forth the details of proposed programs and plans. Access to this material by those not directly involved in the PPBS process undermines the confidentiality necessary for the Secretary and Deputy Secretary to obtain candid advice on the content of the defense program. Also, access to PPBS information by private

firms seeking contracts with the Department may pose ethical, even criminal, problems for those involved and reduce effective competition in the contract awards process.

(ii) *Request for exceptions to this limitation may be granted on a case-by-case basis to meet compelling needs, after coordination with the Office of General Counsel, by the Head of the OSD office responsible for the PPBS phase to which the document or data base pertains: the Under Secretary of Defense (Policy) for the planning phase; the Assistant Secretary of Defense (Program Analysis and Evaluation) for programming; and the Comptroller, DoD for budgeting. A list of the current major documents and data bases for each PPBS phase is in paragraph (B)(5)(11); (C) of this section; all other PPBS materials are also controlled under this policy.*

(B) Disclosure of PPBS information to Congress and the General Accounting Office (GAO) is covered by statute and other procedures.

(C) *Major PPBS Documents and Data Bases by Phase.*

Planning Phase

(1) *Defense Planning Guidance.*

Programming Phase

(2) *Fiscal Guidance* (when separate from *Defense Planning Guidance*);

(3) *Program Objective Memoranda (POM)*;

(4) *POM Defense Program* (formerly FYDP) documents (POM Defense Program, Procurement Annex, RDT&E Annex);

(5) *Program Review Proposals*;

(6) *Issue Papers* (e.g., Major Issue Papers, Tier II Issue Papers, Cover Briefs);

(7) *Proposed Military Department Program Reductions* (or *Program Offsets*);

(8) *Tentative Issue Decision Memoranda*;

(9) *Program Decision Memoranda*;

Budgeting Phase

(10) *Defense Program* (formerly FYDP) documents for September and President's Budget Estimate submissions including *Defense Program Procurement, RDT&E and Construction Annexes*;

(11) *Classified P-1, R-1 and C-1*;

(12) *Program Budget Decisions/Defense Management Review Decisions*;

(13) *Reports Generated by the Automated Budget Review System (BRS)*;

(14) *DD Form 1414 Base for Programming*;

(15) *DD Form 1416 Report of Programs*;

(f) Contract Award Reports.
 (g) Congressional Data Sheets.
 (h) Contractor requests for information contained in the National Military Strategy Document (including annexes) and the Chairman's Program Assessment Document (including annexes and comments) shall be forwarded to the CJCS who shall determine on a case-by-case basis what information, if any, is releasable to the contractor.

(i) Documents That Disclose the Government's Negotiating Position. Documents that would disclose the government's negotiating position (such as pre-negotiation business clearances and positions and government cost estimates) or would adversely impact the government negotiating strategy shall not be released.

(j) Drafts and Working Papers. Drafts and working papers that would otherwise be releasable under paragraph 286h.3(a) shall not be released where their release would inhibit the development of agency positions, jeopardize the free exchange of information that is part of the deliberative process, or compromise the decision-making process.

(k) Freedom of Information Act. Where a request for information, the release of which is restricted under paragraph 286h.3(b) is made under the Freedom of Information Act, the request shall be forwarded to the appropriate official for disposition in accordance with DoD 5400.7-R.* Requests for contractor bid or proposal information pursuant to the Freedom of Information Act shall be subject to subparagraph 5-207 a. of DoD 5400.7-R, which requires notice to a non-United States Government source of a record.

§ 286h.4 Responsibilities.

(a) The Under Secretary of Defense (Acquisition) shall be responsible for establishing uniform policies and procedures for the release of acquisition-related information.

(b) The Under Secretary of Defense (Policy), Assistant Secretary of Defense (Program Analysis and Evaluation) and Comptroller, DoD are responsible for adjudicating requests for access to Planning, Programming and Budgeting information pertaining to their respective phases of the PPB system.

(c) The Head of each DoD Component shall assure that procedures for the release of acquisition-related information are consistent with the policy contained in this Directive and shall not impose any additional restrictions on release of such

information. These procedures shall specifically identify the individuals authorized to release and transmit acquisition-related information.

Dated: July 9, 1990.

L.M. Byrum,

Alternate OSD Federal Register Liaison Officer, Department of Defense

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* See footnote 1 to § 286h.3(b)(2)(i).